Law Of Mortgages

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A SELECTION

OF

CASES ON MORTGAGES,

 $\mathbf{B}\mathbf{Y}$

BRUCE WYMAN.

REVISED EDITION.

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PREFACE.

THE cases included within this book will give only a brief survey of the law of security by way of mortgage; but it is believed that these are perhaps more cases than can be discussed with profit in the class-room, when, as in most schools, not more than thirtysix hours are devoted to the subject. In order to keep the amount of reading required within limits the reports of cases have been shortened; arguments of counsel have always been omitted, and the opinion of the court only is printed where it contains an adequate statement of the issues involved. The headings and subheadings under which the cases are arranged are few and general, as it is felt that it is always better to leave it to the student to analyze the subject for himself as he progresses without reliance upon divisions of the editor. In accordance with the same general policy, the annotations are few, confined largely to citation of cases upon controverted points without indication of the opinion of the editor. Indeed, in the present edition many citations included in the former edition have been stricken out, and only those cases have been left which it was believed it was worth while for the student to read. Advantage is taken of the necessity for a new edition to add many important cases decided in the last few years.

B. W.

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CASES ON MORTGAGES.

CHAPTER I.

THE FORM OF THE MORTGAGE.

Section I. — Legal Mortgage.]

A. Title Theory.

LANDS OF THOMAS, ARCHBISHOP.

Domesday Inquisition, 1085.

[Placita Anglo-Normania, 58.]

In the time of King Edward, Almaer predecessor of Archbishop Thomas was seised of X bovates of land in Ulingeham. This land was put in pledge by Raynerus of Brimon for III pounds in the time of King Edward. And the inquest affirmed that the archbishop ought to hold the lands until the III pounds had been returned to him.

OSBERT DE HINTON ET UX. v. EUSTACE DE MORTON ET AL.

King's Bench, 1201.

[Select Civil Pleas (Selden Society), p. 36.]

THE assize comes to recognise if John de Tysoe and Eustace de Morton and Robert son of Matilda, have unjustly and without judgment disseised Osbert de Hinton and Matilda his wife of their free tenement in Shotteswell within the assize. Eustace de Morton afterwards came and said that Osbert had pledged to him all his (Osbert's)

land of Shotteswell for a term of six years, and (Eustace) produces (Osbert's) charter testifying the same. So that after the pledge was made, came Osbert, contrary to his charter, and carried off his hay. So that Eustace complained before the Justices in Eyre, to wit, Hugh Bardolph and Henry de Wichinton and their fellows, at Warwick, and on account of his complaint (Osbert), was seized and put in prison. And before the same Justices (Osbert) admitted the pledge made to Eustace, and (Eustace) vouches those Justices to warranty thereof. Osbert afterwards came and put himself in mercy. And be it known that Eustace quit-claimed to Osbert the agreement made touching that land, for fifteen shillings, which Osbert gave him.

COLLAN v. POTTEFORD.

King's Bench, 1302.

[Y. B. 30 Ed. I., p. 210.]

EVE COLLAN, &c. against Richard Potteford; and complained of being disseised of a furlong of land, &c. Kyngesham: She is wrong in bringing this assise, for she herself enfeoffed us of these tenements, by her deed which is here; judgment, &c. Middleton: Seised and disseised; and we pray the assise. Kyngesham: We have put forward her deed by way of bar, and she is of full age, and here in court, and she brings forward no title to show how she has become seised since (the deed), judgment, &c. Hervy: Say how she was seised. Middleton: This Eve enfeoffed him as the deed shows: but with this covenant, that if she paid him, &c., within such a time, then she should have again her land; she did pay him, and re-entered the land, Richard giving it up; and thus she was seised, &c. Kyngesham: She alleges a covenant, and shews no specialty to evidence it; judgment, &c. And on the other hand, we will aver that we never gave up the land, &c. Spigonel: Suppose that I execute a charter giving you my land, and that I do not give you seisin thereof, and you come and disseise me, shall the existence of that deed be a good reason for depriving me of the assise? Kyngesham: That is not in point, for she has admitted that we entered by virtue of her charter; and to defeat that entry she alleges a covenant, but does not produce in court any specialty to prove the covenant; judgment, &c. HERVY: Let the assise come. The Assise said that Eve had bought from Richard a chest for the sum of four

¹ Compare: Liddeford v. Wike, 1 Rotuli Curiæ Regis, 86; Kedurto v. Emurton, Rolls of King's Court, Rich. I., 2; Maynard v. Chuerell, Placitorum Abbrevatio, 10; Lehr v. Odo, Select Civil Pleas, 17; Quentin v. Quentin, Assize Rolls, Northumberland, 5; Morse v. Insulla, 17 Oxford Documents, 229; Lerbrenie v. Tresgot, Bracton Note Book, No. 169; Verdorm v. Mortimer, 9 Staffordshire Collection, 40.— Ed.

marks, to be paid for at two times, and put Richard in seisin by the charter, with a condition that if she paid at the times appointed, she should have again her land; that she paid him two marks at the first period; and when the other period arrived he would not receive the money; that she tendered it to him in the County Court, and he would not receive it; that she deposited the money under the sheriff's seal, and then entered the land, and was seised of the messuage for a day and a night. Brumpton: Quite seisin enough in such a case, &c.; wherefore, &c., her seisin with the damages; and because the land had been improved, she shall recover less damages.

BODENHAM v. HALLE.

CHANCERY, 1456.

[Select Cases in Chancery (Selden Society), 137.]

To the right reuerent and worshipfull Fader in God, the Archiebisshop of Caunterbury, Chaunceller of Inglond,

Besecheth mekely Robert Bodenham, that where as he borowed late of John Halle of Salesbury lxxx li., for the whech the seyd John, thorgh (through) sotyll promys caused the saide Robert of trust, the fyrst day of May the xxxiij yere of the Raynyng of oure Soueraygne lorde the kynge that nowe ys, to enfeffe the saide John in the manere of Shipton Berenger yn Suth' Shyre, to haue and holde hit to the saide John, hys heyr and assign, vnder condicion that vif the saide Robert, hys heires or executoures paye or dyd paye to the saide John or to his assignes C li. at the feste of seynt John the Baptiste that shall be in the yere of oure lorde M. CCC. lxj, that thenne the saide feffement sholde be voide, as by a dede endented therof made pleynly appereth, so that the said John purposeth therby to resceue and haue the issues and profites of the said manere vnto the saide day of payment, which will extende to the some of lxxxv markes, and also C li. by way of vsury for the lone of the said lxxx li., or elles the saide maner to be lost and forfeted to hym. Moreover the saide John, ymagynynge more desceyte to distrue the said Robert, caused hym by sotelte to be bounde to the saide Robert in CCC li. by an obligacion of the Statuyt Marchant of Salesbury bereing date the ij day of the saide moneth of Maye; which the saide Robert delyuered to on John Gardner to kepe it tyll suffisant endentures in deffesaunce there of were made by men lerned bytwene the saide Robert and John that the said condicion shulde be perfourmed. And not withstanding that the saide endentures buth not yet made and that the saide obliga-

Compare: Adam v. B., Y. B. 21 Edw. I., 222; Anon., Y. B. 34 Edw. I., 164; Anon.,
 Y. B. 12 Edw. III., 3; St. John v. DeGray, Y. B. 13 Edw. III., 122; Anon., Y. B. 34
 Edw. III., 164; Anon., Y. B. 17 Edw. III., 2; Anon., Y. B. 36 Hen. VI., 7. — Ep.

cion remayneth with the saide John Gardner, and the saide John Halle hath sued execucion vppon the saide statute of the saide CCC li. by vertue wherof he hath take the saide Robert and put hym into streyte pryson at Salesbury; so that the saide John purposeth to have CCCCL li. and more of the saide Robert for the lenynge of lxxx li., ayeynes ryght and conscience, in fynall distruccion of the saide Robert; Wherof he may haue no remedy by the Comyn Lawe. Please it youre gracious lordship to sende for the saide John by a writte sub pena for to appere byfore yow at a certeygne daye, to answere to the premisses, and thervppon ye to execute Justice as good feyth and consciens requyreth: for the love of god and in the werk of Charyte.

[Indorsed on the bill: prayer granted; statute cancelled; re-enfeofment ordered.] ¹

LANGFORD v. BARNARD.

CHANCERY, 1595.

[Tothill, 134.]

THE Court decreed money to the Plaintiffe against the Defendant, albeit hee had Judgement and Execution, being upon the point of usurious Contract, and a Lease being become forfeited, and the Mortgagee devised the same to Infants. The Court was of opinion, that the Plaintiffe should have it again paying the money.

ANONYMOUS.

COMMON PLEAS, 1562.

[3 Leonard, 6.]

THE Lessor mortgaged his Reversion in Fee, to the Lessee for years, and at the day of Mortgage for payment of the Mony, he paid the Mony; It was holden in this Case, that the Lease for years was not revived, but utterly extinct.

¹ Compare: Boddesworth v. Coke, 1 Cal. Ch. lxvii; Anon., Y. B. 9 Edw. IV., 25, 34; Emanuel College v. Evans, 1 Rep. Ch. 18; Perrie v. Rome, 2 Freeman Ch. 258; Lockwood v. Ewer, 2 Atk. 303, — Ed.

GOODALL'S CASE.

King's Bench, 1598.

[5 Coke, 195.]

Between Cuthbert Goodall, plaintiff, and John Wyatt, defendant, in an Ejectione firmæ of lands in Ailesbury, in the county of Buck, (which began Hil. 37, Rot. 805). The defendant pleaded not guilty. and the jurors gave a special verdict to this effect; Sir John Packington was seised of the tenements aforesaid in fee, and by his deed indented, 1 Julii, 35 Eliz, did thereof enfeoff Robert Woodcliff and his heirs, proviso semper quod si præfat' Johannes infra unum annum post decessum ipsius Roberti solvat, seu solvi faciat hæred', executor', sive administrator' ipsius Roberti summ' centum marcarum legalis monet' Angl', quod tunc et deinceps presens charta indentata et seisina inde habita, vacua sit nullius vigoris, Robert Woodcliff did thereof enfeoff Edward Woodcliff, whose estate by divers mean conveyances Thomas Goodall the lessor of the plaintiff had: and afterwards 7 Jan. 35 Eliz. the said Robert Woodcliff died, after whose death Drue Woodcliff being his son and heir, and Anne his wife took letters of administration of his goods; by which Drue and Anne made a letter of attorney to Thomas Goodall to demand and receive the said 100 marks on the said proviso or condition, of which the said Thomas Goodall gave notice to the said Sir John Packington; and afterwards, and within the said year, it was agreed between the said Sir John and the said Drue, that the said Sir John should pay to the said Drue but £32 of the said 100 marks, and no more, and yet in appearance for the better performance of the condition, that the whole sum of 100 marks should be paid, and that the residue above £32 should be repaid to Sir John; upon which Sir John paid within the said year 100 marks to the said Drew, and presently all was repaid to the said Sir John but the said £32 according to their preceding agreement aforesaid; and afterwards the said Sir John did re-enter into the said tenements, pretending that he had performed the condition, upon whom the said Thomas Goodall entered, and made the lease to the plaintiff, who entered and was possessed, until the said John Wyatt ousted him (without conveying any interest or authority to the said Wyatt under Sir John Packington), but the jury concluded, et si super totam materiam, &c. præd' solutio, præd' centum marcarum per præd' Johannem Packington milit' præfat' Drugoni fact', sit bona et legalis solutio in lege earundem centum marcarum, secundum formam provisionis præd' juratores prædicti ignorant: et si, &c. So that the doubt which the jury conceived, was only on the said payment; and whether the said payment, as is aforesaid, was sufficient in law to give title of entry by force of the said condition to the said Sir John Packinton on the said Thomas Goodall: and it was objected on the defendant's part that although before the payment it was agreed between the said Sir John Packington and the said Drue Woodcliff, that the said Drue should have but £32 of the said 100 marks, yet. Sir John paid the whole, and Drue received the whole, and the property of all the moneys was in Drue; and if Drue would not have repaid him the residue above £32 Sir John had not any remedy, but an action on the case (if any action on the matter would lie). And therefore they concluded that it was a good payment to satisfy the said condition.

But to that it was answered and resolved by Popham, Chief Justice, and the whole court, that it was not any performance of the condition, and their reason was, because an estate of inheritance was by the payment of the said money to the heir to be devested out of Thomas Goodall, the assignee of the land; and therefore the condition ought to be performed in truth by a true and effectual payment, and not by a shadow or color of payment: and in the case at bar the precedent agreement guided the subsequent payment, and their intent was, that only the said £32 should be enjoyed and kept, although more was in appearance paid; but the estates of third persons shall not be devested by colorable or covinous payments, but by true and effectual payments, as is aforesaid. Vide 19 Hen. VI., 54, 20 Edw. III., Accompt 79, and 18 Edw. IV., 18, where it appears, that conditions ought to be performed truly and effectually, quia factum non dicitur, quid non perseverat.

It was resolved, that if all the money had been paid to the heir bona fide (although Robert Woodcliff his father had conveyed over his whole estate in the land) it had been sufficient. For the heir is a person expressly named in the condition to whom the payment shall be made, and the feoffor is a stranger to the conveyance that the feoffee and his assigns made, and the feoffor shall not take notice at his peril of the validity of them, nor of the conditions or limitations annexed to them.

It was resolved, that as this condition is in the case at bar, the feoffor could not have paid it to Goodall the assignee of the land, for heirs, executors, or administrators were expressed in the condition, and the assignee not, as in the case of Litt. lib. 3, cap. Condition, 78. If the condition was, that if the feoffor shall pay to the feoffee, or to his heirs, such a sum on such a day, there, after the death of the feoffee if he dies before the day limited, the payment ought to be made to the heir at the day set, where this word (ought) which imports necessity in law, was observed; and therefore in such case the money shall not be paid to the executors. And so the doubt in 12 Edw. III., Condition, 9 and Dyer, 2 Eliz. 181, well resolved; but the assignee of the land, although he be not named in the condition amongst the persons who shall pay

the money, yet he may well pay the money for the saving of his tenure. as Litt. saith, eodem, lib. fol. 77. So note the difference, that the money shall not be paid to the assignee of the land without naming him in the condition, for there the payment goes to the defeasance of the inheritance, but the money shall be paid by the assignee in salvation / of his inheritance. Mich. 23 & 24 Eliz. in the Court of Wards, the case was such; Edw. Randal seised in fee of certain lands within the county of Surry, by deed indented and inrolled according to the statute. did covenant with John Brown, that if the said Brown did pay to the said Randal, his heirs or assigns £400 the 4th day of March then next following, at a certain place, that then the said Edward and his heirs would stand seised of the said lands to the use of Brown and his heirs. and before the said day Edward Randal died, and having issue a son, made his will in writing, and made Alice, his wife, Ralph Hare, and Hugh Hare, his executors, and devised the said land to his wife during the minority of his son, and died, his issue within age, and in ward to the Queen; and before the day, the wife renounced, and took letters of administration. And now the question was, to whom the money should be paid. And in that case three points were resolved by the Chief Justices, Wray and Dyer, and the whole Court of Wards, that is to say, that in the said case these words (assigns) shall be only intended of the assignees of the estate of Edw. Randal, for he has an estate in him assignable, and the law will never seek out an assignee in law, when there may be an assignee in fact; but if Edward Randal had made a feoffment in fee, on condition that the feoffee should pay the money to the feoffor, his heirs or assigns, &c. there, because he departs with his whole estate in fee, and has but a bare condition which he cannot assign over, the law, which will never reject any word, if by any reasonable construction it may take effect, will make construction what person will be most proper as his assignee in law to receive the said money; and those the law adjudges to be his executors, because they represent the person of the testator for all goods and chattels: and in such case the feoffor cannot have any assignee in fact. a good difference; and therewith agrees 27 H. 8. 2. a. 2. It was resolved in the said case of Randal, that the wife having by the devise but a particular interest in the land, was not assignee of the land within the said proviso: so if the said Edward had made an estate for life or years, &c. for none shall be assignee in this case: but when the covenantor departs with his whole estate, as if he makes a feoffment in fee, a gift in tail, or a lease for life, with the remainder over in fee, in such case the lessee for life, or donee in tail is the assignee: but so long as the covenantor has the reversion remaining in him, the payment ought to be made to him. So it was said, that if Edward Randal had made an assignment of his whole estate in part, as long as any part remained with Edw. Randal, the tender ought to be made to him or his heirs. 3. It was resolved in the said case of Randal, that the tender ought to be made to the heir, and not to the executors,

because the heir was expressly named, which excluded executors and administrators. Et expressum facit cessare tacitum.

4. It was resolved, that although in the case at bar no title was found for the defendant, but he is as a mere stranger, yet the court in a special verdict will never doubt but of that only whereof the jurors have conceived a doubt: and therefore for as much as they rely and conclude on the payment, whether it be a good performance of the condition or not, the court ought not to give judgment till they have resolved that which the jurors have referred to their consideration, and all other matters shall be intended and supplied, but only that which the jurors have referred to the consideration of the court. And so it was adjudged, M. 30 & 31 in B. R. between Scovel and Cabel: and afterwards judgment was given for Cuthbert Goodall the plaintiff: on which judgment the defendant brought a writ of error in the Exchequer-chamber: and all the court on argument and debate of the case there again did concur in opinion with the Justices of the King's Bench. and affirmed the judgment. And so this case was resolved by all the Judges of England.1

PHELPS v. SAGE.

SUPREME COURT, CONNECTICUT, 1805.

[2 Day, 151.]

This was an action of ejectment; to which the general issue was pleaded.

On the trial, the defence set up was, that before the commencement of the suit, the plaintiff had conveyed the premises to Patrick Johnson. To repel this defence, the plaintiff offered to prove, that at the time she gave the deed, she and Johnson were both ousted of possession, by the entry and adverse possession of the defendant; claiming, that in consequence of which the deed was void, under the statute against selling disputed titles. To the admission of this evidence, the defendant objected, on the ground that the plaintiff was estopped from alleging any thing against her own deed, and that she could not be permitted to allege her own violation of law as the basis of a recovery. The court overruled the objection, and admitted the evidence. In the further progress of the trial, it appeared, that the plaintiff claimed

¹ Proper payment upon the law day will, of course, discharge the mortgage lien. See Brown v. Bass, 4 Wall. 262; Gage v. McDermid, 150 Ill. 598; Hadlock v. Bulfinch, 31 Me. 246; Flye v. Berry, 181 Mass, 442; Morse v. Clayton, 13 Smedes & M. 373; Ladd v. Wiggin, 35 N. H. 421; Bogert v. Bliss, 148 N. Y. 194; Lewie v. Hollman, 53 S. C. 18; Duncan v. Ewing, 3 Tenn. Ch. 29. Proper tender upon the law day, also, is generally held to have the same effect of discharging the mortgage lien. See Mitchell v. Roberts, 5 McCrary, 425; Jones v. New York G. Co., 101 U. S. 622; Schearff v. Dodge, 33 Ark. 346; Shields v. Lozear, 34 N. J. L. 496; Lynch v. Hancock, 14 S. C. 66; but see Parker v. Beasley, 116 N. C. 1.— ED.

under a mortgage deed, and the defendant under a subsequent absolute deed, from the same person. In order to show that the plaintiff's title was devested, the defendant offered to prove, that after the expiration of the law-day, the whole mortgage money was paid to the plaintiff's satisfaction. To the admission of this evidence the plaintiff objected, alleging that no payment of the money, or settlement of the debts, after the law-day, had expired, could devest the plaintiff's title, and revest it in the mortgagor, but that the remedy was by application to a court of chancery. On this principle, the court rejected the evidence. To the ruling of the court, in both instances, the defendant filed his bill of exceptions.

BY THE COURT UNANIMOUSLY,

The judgment was affirmed.

BURGAINE v. SPURLING.

King's Bench, 1632.

[Cro. Car. 283.]

ALL THE COURT AGREED that whereas in the principal case, the condition was for the payment of £1060 upon the first of July, and the payment was made before the first of July, viz. upon decimo sexto Junii, and an acceptance thereof, it is a good performance of the condition.²

- ¹ The original common law view was that even when payment was accepted after the law-day the title did not *ipso facto* revest in the mortgagor. Smith v. Vincent, 15. Conn. 1; Jones v. Smith, 79 Me. 446 (see Hussey v. Fisher, 94 Me. 301); Holman v. Bailey, 3 Met. 55. A fortiori tender made after the law-day would not. Cram v. McGoon, 86 Ill. 431; Storey v. Krewson, 55 Ind. 397; Maynard v. Hunt, 5 Pick. 240.
- ² It is the usual law for normal cases that payment accepted will serve as a performance of the condition. See Brown v. Stead, 5 Sim. 535; Flye v. Berry, 181 Mass. 442. But tender made before the law day is generally held ineffectual. See Brown v. Julius, 141 Ind. 310; Moore v. Kime, 43 Neb. 517. Ed.

WATSON v. WYMAN.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1894.

[161 Mass. 96.]

Holmes, J. This is a bill in equity for the cancellation of a mortgage, but containing an offer to pay any sum that may be found due upon it. The defendant Davis took an indorsement of the note and an assignment of the mortgage for value before maturity, and without notice. Before he did so the mortgagor had given the mortgagee a second mortgage for a sum including that due on the first mortgage and in satisfaction of it, but had left the first mortgage in the mortgagee's hands. On the same day the plaintiff bought the second mortgage.

Payment of the mortgage note on the day when it falls due is performance of the promise, and very possibly would discharge the note even as against one who took it for value and without notice later on the same day. But payment before the day, or a satisfaction like that in the present case, is a defence which binds only the party receiving payment and those who stand in his shoes. Burbridge v. Manners, 3 Camp. 193, 194; Morley v. Culverwell, 7 M. & W. 174, 181, 182; Kernohan v. Durham, 48 Ohio St. 1, 7; Head v. Cole, 53 Ark. 523, 524; Palmer v. Marshall, 60 Ill. 289, 293. See Wheeler v. Guild, 20 Pick. 545, 552, 553, 555.

It commonly is assumed that the mortgage follows the note, and that if the holder can recover on the note he may avail himself of the Taylor v. Page, 6 Allen, 86; Carpenter v. Longan, 16 Wall. 271; Jones, Mort. (4th ed.) §§ 834-840. We are of opinion that this is the law where the note has been paid in full in advance. As is pointed out in Morley v. Culverwell, ubi supra, payment before the day is not performance of the contract, and it follows, notwithstanding the language often used, that in a strict sense it does not satisfy the condition of the mortgage. If we are right in our concession as to the effect of a payment on the day, we have here the technical reason for the different effect of an earlier payment. The note still stands unperformed, and therefore secured, subject only to a personal defence, as it is happily called by Mr. Ames. 2 Ames, Bills & Notes, 811. But the very meaning of a personal defence is, that it does not accompany the note into all hands, but only into those which are in no better position than the person against whom it has accrued. Like fraud or duress by threats, it leaves the legal transaction still in full force, and only furnishes a reason why a particular person should not be allowed to insist upon it. proceeds upon an argumentum ad hominem. It is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience." Eyre, C. J., in Collins v.

Martin, 1 B. & P. 648, 651, cited by Shaw, C. J., in Wheeler v. Guild, 20 Pick. 545, 551.

Another argument drawn from the registry laws deserves con-A mortgage cannot be extinguished more effectually than by a release. Yet we presume that it hardly would be argued that an unrecorded release would be valid as against a purchaser of the mortgage before maturity and without notice. As was said in a case which settled the law for Massachusetts, "a prior unrecorded deed has no effect except as between the parties to it, and others having notice of it. . . . It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is as to them a mere nullity." Dow v. Whitney, 147 Mass. 1, 6. It might be thought that the same considerations apply to a quasi discharge by payment of the whole amount in advance. The mortgagor may have an entry made on the margin of the record of the mortgage. Pub. Sts. c. 120, §§ 24, 25. When no such entry is made, and the registry contains no notice of payment of any kind, it would seem that one to whom the mortgagee produces the note not yet due and the mortgage for sale has the same right to assume that the record title is the true title that he would have had in the case of an unrecorded release. If the note were overdue, that would be notice, or would put the purchaser in the position of one having actual notice, and therefore in that case the registry laws would not help him.

In Grover v. Flye, 5 Allen, 543, the demandant claimed title under a sale of an equity of redemption on execution. In fact, the mortgage had been paid in full before it was due, but the record did not disclose the payment, and neither the officer nor the demandant had notice of it. The court held that the rule was the same that it would have been between the original parties. In such a case the purchaser, of course, does not claim as indorsee or holder of the mortgage note. We accept the authority of the decision so far as it goes. But if it is not to be distinguished satisfactorily from one like the present, so far as the argument from the registry laws is concerned, it has no bearing on the considerations first stated, and those are sufficient to dispose of the case. It follows that the decree sustaining the mortgage in the hands of the defendant Davis, and limiting the plaintiff to a right to redeem, was correct.

Decree affirmed.

ALLENDORFF v. GAUGENGIGL.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1888.

[146 Mass. 542.]

[Contract for breach of an agreement in writing, dated November 12, 1887, by the plaintiff to sell and by the defendant to buy, at a price named, a certain parcel of land in Brockton. The issue was whether the plaintiff could make a good title. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, upon an agreed statement of facts, the essential points in which appear in the opinion below.]

C. Allen, J. The original title was in Mrs. Young, and the plaintiff's title depends on the question whether her title was conveyed by the mortgage of December 26, 1876. She was not a party to the earlier part of the mortgage, and her participation in it as a grantor was limited to the clause near the end, wherein she relinquished her right in the premises to the grantee, and released to the grantee and his heirs and assigns all right of dower and homestead. Her relinquishment of her general title was merely to the grantee, and not to his heirs and assigns. The suggestions of the plaintiff's counsel that the word "grantee" included the grantee and his heirs and assigns, and that the words "heirs and assigns," used later, may be taken as referring back so that the relinquishment to the grantee included his heirs and assigns, are quite inadmissible. So also the suggestion that she was a party to the power of sale in the mortgage, and that her title was concluded by the exercise of that power. The mortgage therefore only included a life estate in the lot now in question; and the title offered by the plaintiff is not good. Bruce v. Wood, 1 Met. 542; Raymond v. Holden, 2 Cush. 264.

Judgment affirmed.

ELLITHORPE v. DEWING.

SUPREME COURT, VERMONT, 1813.

[1 D. Chip. 141.]

EJECTMENT. It was insisted by the counsel for the defendant, that Whitney, having while in possession, although a mortgagor, surrendered the premises in dispute to the defendant, it must be considered as an amicable settlement of the boundaries which was binding on the plaintiff. And further, that the deed of release from Whitney to the plaintiff, having been made while the defendant was in possession of the premises, claiming adverse both to Whitney and the plaintiff, was void, being within the act of October, 1807, to prevent fraudulent speculations and sales of choses in action,

By the Court. A mortgager cannot effectually surrender or pass any right of the mortgagee in the premises. A release of the equity of redemption to the mortgagee in whom is the legal title is not within the act referred to. Beside, it is not necessary to show the release. The condition of the mortgage having been broken, the plaintiff's claim is not founded on the release, but on the original mortgage deed which was made previous to the defendant's possession. The release is of an equitable right only — it adds nothing to the plaintiff's legal title.

Verdict for the plaintiff.

ROBY v. MAISEY

KING'S BENCH, 1828.

[8 B. & C. 767.]

EJECTMENT. At the trial before GASELEE, J., at the last Gloucester Summer Assizes, it appeared that the premises had been mortgaged in fee by the defendant to the lessor of the plaintiff, that the mortgage was forfeited, and that the defendant remained in possession. The usual evidence of the mortgage deed was given, but there was no proof of any demand of possession. Upon this it was contended, that the plaintiff ought to be nonsuited; but the learned judge directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

LORD TENTERDEN, C. J. The mortgagor is not in the situation of tenant at all, or at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser at the option of the mortgagee.

Rule refused.

¹ Under the original common law view the right of the mortgagee to take immediate possession was unquestioned. Smartle v. Williams, 1 Salk. 245; Thunder v. Belcher, 3 East, 449.—ED.

DOE, DEMISE, OF SHUTE v. GRIMES.

SUPREME COURT, INDIANA, 1843.

[7 Blackf. 1.]

APPEAL from the Wayne Circuit Court.

Sullivan, J. This was an action of ejectment brought by a mortgage against a mortgagor. Plea, not guilty. The mortgage-deed was dated August the 21st, 1841, and was made to secure the payment of 4,100 dollars in three years from its date. The suit was commenced before default in the payment of the mortgage-money, and the only question in the case is, whether ejectment may be maintained by a mortgagee against a mortgagor before default, where the mortgage-deed is silent as to the possession. The Circuit Court gave judgment for the defendant, and the plaintiff appealed to this Court.

The law, we think, is well settled that the mortgagee, by virtue of his mortgage, becomes the legal owner of the premises, and is consequently entitled at law to the immediate possession, unless there be an agreement between the parties, expressed in the contract, or plainly inferable from it, that the mortgagor shall remain in possession. Coote on Mort. 342, 351; 1 Powell on Mort. 158, n.; 3 id. 1152; 4 Kent. 155. In Birch v. Wright, 1 T. R. 378, Buller, J., says, "The mortgagee has a right to the actual possession whenever he pleases; he may bring his ejectment at any moment that he will; and he is entitled to the estate as it is with all the crops growing on it." And in Colman v. Packard, 16 Mass. 39, the Court said that it had long been settled and well known, that a mortgagee had a right to immediate possession of the mortgaged premises; and yet, said the Court, "parties still go on making mortgages without any covenant respecting the possession, although it is intended that the mortgagor shall remain in possession until the condition is broken." Courts of equity also acknowledge the right of the mortgagee to the possession, and will not, it seems, interfere to prevent him from pursuing his legal remedy. Cholmondeley v. Clinton, 2 Merivale, 359; Williams v. Medlicot, 6 Price, 495.

Per Curiam. The judgment is reversed with costs. Cause remanded, &c. 1

¹ This represents the law in many American jurisdictions. Woodward v. Parsons, 59 Ala. 625; Rockwell v. Bradley, 2 Conn. 1; Polhill v. Brown, 84 Ga. 338; Holbrook v. Greene, 98 Me. 171; Mayor v. Groh, 101 Md. 560; Lacey v. Holbrook, 11 Met. 458; Pettengill v. Evans, 5 N. H. 54; Soper v. Guernsey, 77 Pa. 250; Stedman v. Gassett, 18 Vt. 346. — Ed.

WILKINSON v. HALL.

COMMON PLEAS, 1837.

[8 Bing. N. C. 508.1]

This was an action of debt upon the statute 4 Geo. II., c. 28, s. 1, brought by the plaintiff, who claimed as one of two tenants in common in fee of a wharf and warehouse, called Botolph Wharf, or Botolph Quay, in the city of London, against the defendants, as tenants of same premises, to recover double the yearly value of one undivided moiety of the same premises, which it was alleged the defendants had wrongfully held over after the service upon them of notice to quit and demand of possession. The plaintiff before demise made by him to the defendant had mortgaged his interest to one Ellis in fee who had by clause in the deed made a redemise to the plaintiff.

VAUGHAN, J. Looking at this agreement, I can see nothing in it that points to a yearly taking; on the contrary, the reservation of rent, and other stipulations, plainly show that the letting was by the quarter only. Whether such a holding comes within the enactment of Geo. II. is a grave question, which I do not decide; but I have no doubt that an action for use and occupation lies. The deed shows a studious anxiety to give a legal right to the mortgagor to hold the premises till the year 1840, notwithstanding the conveyance to Wynn Ellis in fee. In modern times it has been usual to insert these special provisos in mortgage deeds, and the effect of them is to give the mortgagor complete control over the property as tenant for years, to the mortgagee. Then, to support the action for use and occupation, the plaintiff must show an occupation by the defendant; the value of the premises; and that the defendant occupied by permission of the plaintiff. The two first points are not contested here, and the last must be implied from the situation and conduct of these parties.

Judgment for plaintiff.2

WALES v. MELLEN.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1854.

[1 Gray, 512.]

[Writ of entry to obtain possession of land described in a mortgage from the tenant to the demandant. Dewey, J., before whom the case was tried, reserved the question, whether the action could be main-

¹ Only the opinion of VAUGHAN, J. is printed; the court was unanimous. - ED.

² The situation when there is virtual redemise to the mortgagor is discussed in Prinhorn v. Souster, 8 Exch. 763; Whitaker v. Halls, 7 Bing. 322; Grandin v. Hurt, 80 Ala. 116; Bean v. Mayo, 5 Me. 89; George's Creek C. & I. Co. v. Detmold, 1 Md. 225; Flagg v. Flagg, 11 Pick. 475. — Ed.

tained before condition broken, for the consideration of the full court.

The facts appear in the opinion.]

METCALF, J. There is no doubt that by our law a mortgagee may take possession and eject the mortgagor, before condition broken, unless there is an agreement between them to the contrary. Newall v. Wright, 3 Mass. 155; Rev. Sts. c. 107, § 9. Such is also the law of New Hampshire and Maine. But an agreement by the mortgagee. that the mortgagor may remain in possession until condition broken, need not be expressly set forth in the mortgage, nor in any other writing. Whenever it appears by necessary implication from the terms/ of the condition of the mortgage, that it must have been the under standing of the parties that the mortgagor should retain possession. the mortgagee can neither enter and expel the mortgagor, nor maintain a writ of entry against him, before condition broken or waste committed. Hartshorn v. Hubbard, 2 N. H. 453; Flanders v. Lamphear, 9 N. H. 201; Rhoades v. Parker, 10 N. H. 83; Lamb v. Foss, 21 Maine, 240; Clay v. Wren, 34 Maine, 187. In the case now before us, it is set forth, in the preamble to the condition of the mortgage. that the said Hannah had conveyed the demanded premises to the said Nathaniel K. "for her future maintenance and support," and that the said Nathaniel K. had, "at the same time, reconveyed the same premises to said Hannah, as security for such maintenance and support." Then follows the condition, that the tenant shall maintain the demandant, in sickness and in health, by providing all things necessary for her comfort and support, and at her decease give her a decent burial. We are of opinion, upon the reason of the matter, as well as upon the decisions above cited, that it is a necessary implication from the terms of this preamble and condition, that the tenant should retain possession of the demanded premises while he should perform, from time to time, the acts, the performance of which the mortgage was intended to secure. By taking the demanded premises from him, the demandant would probably prevent him from carrying into effect the purpose for which alone the mortgage is expressed to be made.

The demandant's counsel relied on the case of Colman v. Packard, 16 Mass. 39, as a conclusive authority for the maintenance of this action. But in that case, though it much resembles this, the doctrine, which we now adopt and apply, was not considered. The points there discussed and decided were, that the mortgagee was entitled to possession, before condition broken, unless there was a written agreement to the contrary; and that parol evidence of such agreement was inadmissible. And these points were rightly decided. But in applying the first of those points to the facts of that case, the doctrine of an agreement necessarily implied from the terms of the condition of the mortgage was overlooked.

Demandant nonsuit.

 $^{^1}$ The right of the mortgagor to retain possession was implied from the circumstances in Clay v. Wren, 34 Me. 187, and Rhodes v. Parker, 10 N. H. 83. — Ep.

NUGENT v. RILEY.

SUPREME COURT, MASSACHUSETTS, 1840.

[1 Met. 117.]

SHAW, C. J. The first and principal question in this case is. whether the construction of the lease in question was correct. judge instructed the jury, that the lease described in the case constituted an interest or term defeasible on a condition, and therefore had the character of a mortgage. The instrument purports to be an indenture, but was executed by the lessor only. It is a common lease of tenements for seven and a half years, acknowledged and It recites that the lessee has paid \$78.64 in full for the rent for the whole term. Then comes this clause. "And the lessee covenants, promises, and agrees to reconvey said premises to the lessor, upon the payment of the aforesaid sum and interest thereon." It has often been held, that where, upon a conveyance of an estate or interest in land, there is a stipulation in the deed itself or in any separate deed executed at the same time, and constituting with the conveyance one transaction, that the estate shall be reconveyed, upon the payment of money, such stipulation constitutes a defeasance, as much as if the words were "on condition," or "provided however," &c. Taylor v. Weld, 5 Mass. 109; Carey v. Rawson, 8 Mass. 159; This rule is most frequently Scott v. McFarland, 13 Mass. 310. applied to the case of conveyances in fee, but a conveyance for life or years falls within the same principle.

Being then a conveyance for a term of years, defeasible upon a condition, the relation of the parties is that of mortgager and mortgagee.

In the present case there is no covenant, technically, on the part of the lessee, to reconvey upon condition, because he has not executed the instrument; but being inserted in the same conveyance which raises the term and leases the estate, it enures by way of condition; and the lessee, by accepting the deed, in the form of an indenture, but in effect a deed poll, becomes bound by the condition.

The parties then standing in the relation of mortgagor and mortgagee, all the rights and duties incident to that relation attach to them. The mortgagee, being in possession and taking the rents and profits, must upon redemption account for them, as payment, first to keep down the interest, and the surplus, if any, towards the principal. Newall v. Wright, 3 Mass. 138.

Another important consequence is, that in this case, if the \$78.64 is paid at any time during the term, the condition is saved at law, the estate for years created by the lease is defeated, and the lessor is in of his old estate; whereas, in the common case, if the money is not paid within the time, the condition is broken at law, the estate of

the mortgagor is reduced to an equity of redemption, and he must have a bill to redeem, in order to restore him to his estate.

The rents and profits, received by a mortgagee in possession, either before or after condition broken, are so exclusively appropriated by law, without any act of the parties, to the payment of the interest and principal of the debt, or sum to be paid, in order to defeat the estate, that when they amount to a sufficient sum to extinguish the debt, including such principal and interest, the debt is *de facto* paid. If this occurs before condition broken, the estate is defeated, and the mortgagor may enter.

In the present case, it is found that the defendant had received, of the rents and profits of this estate, a sum much more than sufficient to pay the \$78.64, and interest, together with repairs and all costs, charges, and expenses of every kind; and this being before breach of condition, the lease was determined.

Then comes the question, whether the plaintiff can recover the surplus, over and above the payment of his debt, in an action for money had and received. Had the defendant occupied the estate himself, it would have presented a question of more difficulty. But the case finds that he let out the estate to others, and received the rents. All that he received after his debt was paid, he could not receive as mortgagee, because his term then expired. He received it as money, to which the plaintiff, in good conscience, was entitled. He then received it to his use, and this action will lie for it.

It was said that the remedy of the plaintiff should be sought for on the covenant of the lessee. Probably the counsel for the defendant did not advert to the fact, that the deed is not executed by the defendant, so that there is no covenant, technically, on his part. Perhaps the acceptance of a deed poll would create an express promise on the part of the grantee, to perform acts on his part stipulated in the deed to be performed. Goodwin v. Gilbert, 9 Mass. 510. When such promise results in nothing more than a duty to pay money, general indebitatus assumpsit will lie.

But there is another consideration applicable to this objection. There is no stipulation, on the part of the lessee, to account for the surplus rents, after the debt is paid, but only to reconvey the estate, when it is paid. If he received rents after his debt was paid, he received money which equitably belonged to the plaintiff, and the duty of paying it results and raises a promise implied by law, to enforce which this is the proper form of action.

Judgment on the verdict.

TOOMER v. RANDOLPH.

SUPREME COURT, ALABAMA, 1877.

[60 Ala. 356.]

APPEAL from the Circuit Court of Hale.

The record does not show the name of the presiding judge.

This action was brought by the appellants, suing as partners, against Philip B. Cabell; and was commenced by attachment, sued out on the ground of the defendant's non-residence. for the attachment was made on the 26th January, 1876, before a justice of the peace of the city and county of Mobile, by whom also the attachment bond was taken and approved; and it is recited in the bond that the attachment has been obtained, returnable to the next term of the Circuit Court of Hale. The attachment set out in the record, which is dated the 29th February, 1876, was issued by the clerk of the Circuit Court of Hale, and was executed by summoning T. B. Randolph, by process of garnishment, as the debtor of said The plaintiffs' cause of action was the defendant's promissory note for \$706.84, dated the 25th February, 1874, and payable to the plaintiffs, at their office in Mobile, on or before the 1st December, The garnishee appeared, in answer to the summons, and filed the following answer:

"On or about the 28th December, 1870, this garnishee loaned to said P. B. Cabell the sum of \$5,000; for which said Cabell contracted and agreed to pay him ten per cent per annum interest thereon; and said Cabell paid interest on said loan, according to said contract, up to 1st January, 1873. At the time of making said loan to said Cabell, he, the said Cabell, executed to this garnishee his promissory note, secured by a mortgage, with power of sale, upon the following lands," describing them; "a copy of which mortgage is hereto attached as a part of this answer, and referred to as a part of this answer. Said Cabell failed to pay any interest on said loan, after the 1st January, 1873; and thereupon, on or about the 1st January, 1875, garnishee took possession of said land under said mortgage, and rented it for the year 1875, for fourteen bales of cotton: of which rent, he collected twelve bales, and sold them on or about the 1st November, 1875, the net proceeds amounting to \$720, which was received by this garnishee; and the other two bales garnishee paid and allowed to the tenant, Sylvester Robinson, for repairing gin-house and screw. Afterwards, on or about the 6th December, 1875, garnishee proceeded to advertise and sell said real property, for the satisfaction of said debt, in accordance with the power of sale in said mortgage; and at the sale thereof, on the 6th December, 1875, had the same bid in for him, by his attorney, for

the sum of \$6,651.43, there being no other bid for said property. Garnishee conveyed said lands, by deed, to one P. A. Tutwiler, for a consideration of \$6,651.43, and said Tutwiler immediately reconveved said lands to him, for \$6,651.43; but no money was paid by said Tutwiler to garnishee, nor by garnishee to said Tutwiler. Garnishee had paid out on said land, taxes for 1874, \$100; taxes for 1875, \$100.72; advertising sale of said property, \$12; auctioneer's fee, \$5; and the interest on said mortgage debt, at the time of the sale, was \$1,464.59; and there was due from this garnishee to said Cabell, as a credit on said mortgage debt, the sum of \$35, for a cow bought of him. Plaintiffs hold a second mortgage on said lands. Garnishee does not deny their right, or the right of the defendant in attachment, to redeem said property, or to have the rent referred to appropriated, pro tanto, in extinguishment of said debt; and he is and has been willing, and has offered, to take in redemption thereof less than the amount actually due, deducting said rents, and now offers to do so. Otherwise than as may be shown by the above statement of facts, garnishee is not now, and was not at the time of the service of the garnishment in this case, indebted to the said P. B. Cabell, nor did he have any effects, goods, &c., belonging to said defendant, in his possession, or under his control."

On this answer, the court refused to render a judgment against the garnishee, and discharged him; and this judgment is now assigned as error by the plaintiffs in attachment.

BRICKELL, C. J. A mortgagee, if there is not in the mortgage a stipulation to the contrary, or a reservation by the mortgagor of possession until default in the payment of the mortgage debt, has the immediate right of entry, and may eject the mortgagor or his tenants. Duval v. McLoskey, 1 Ala. 737; Welsh v. Phillips, 54 Ala. 309. The theory of a mortgage, prevailing in this State, is that, at law, it creates in the mortgagee a direct, immediate estate in the landa fee simple, unless otherwise expressly limited. The estate is conditional - annexed to the fee is a condition, which may defeat it. If the mortgagor, not having reserved the right of possession until default in the performance of the condition, remains in possession, he is the mere tenant at will of the mortgagee. After the law-day, and default in the performance of the condition, the estate vests absolutely in the mortgagee - the fee is freed from the condition annexed to it. Nothing remains in the mortgagor but the equity of redemption, of which, as between mortgagor and mortgagee, courts of law do not take notice. Before default, all that remains in him is the right to perform the condition, and thereby restore his original estate. Paulling v. Barron, 32 Ala. 11; Barker v. Bell, 37 Ala. 358; Welsh v. Phillips, supra.

In courts of equity, the theory of a mortgage is, that until foreclosure it is a mere security for a debt, the mortgagor continuing the real owner of the fee. From this theory results the general principle, that a mortgagee in possession, before or after default in the payment of the mortgage debt, and before foreclosure, is a trustee of the rents and profits for the mortgagor, and bound to apply them in extinguishment of the mortgage debt. Davis v. Lassiter, 20 Ala. 561; 2 Wash. Real Prop. 221, § 9. All reasonable expenditures for taxes, necessary repairs, and other necessary expenses incurred on account of the estate, the mortgagee is allowed to retain from the rents and profits; and it is the balance only which may be applied in extinguishment of the mortgage debt. An accounting is necessary to the ascertainment of the balance. The law does not apply the balance of the rents and profits to the mortgage debt; for, at law, they accrue to the mortgagee, as the owner of the legal estate. It is in equity only the application is made, in the nature of an equitable set-off, and as an incident to the right of redemption. Hubbell v. Moulson, 53 N. Y. 225.

2. If it is admitted that the mortgagor, notwithstanding the second mortgage to the appellants, has a right to compel the application of the rents received by the appellee while in possession, to the payment of the mortgage debt, the remedy is exclusively in equity, and is incidental to the right of redemption. In a court of law, the appellee is regarded as having received only and simply the issues of his own estate. A garnishment is strictly a legal proceeding, operating only on the rights of the defendant in attachment or judgment, which he could in an action at law enforce in his own name. It cannot be converted into a method of drawing within the jurisdiction of courts of law matters and rights of purely equitable cognizance. Harrell v. Whitman, 19 Ala. 135; Roby v. Labuzan, 21 Ala. 60; Godden v. Pierson, 42 Ala. 370; Henry v. Murphy, 54 Ala. 246.

What may be the rights of the appellants, as subsequent mortgagees, cannot be considered or determined in the present proceeding. A garnishment is not a remedy for the enforcement of any cause of action vesting only in the creditor suing it out. Its whole scope and operation is to subject legal demands recoverable only by the debtor, or property of his which is subject to execution. Henry v. Murphy, supra; Thompson v. Wallace, 3 Ala. 132.

There is no error in the record, and the judgment is affirmed.¹

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¹ Accord: Hubbell v. Moulson, 53 N. Y. 225. - Ep.

EX PARTE WILSON.

CHANCERY, ENGLAND, 1813.

[2 Ves. & B. 252.]

The Petition stated a Mortgage by William Adams and John Stuart to the Petitioner for £1,000: the Premises being at that Time under Lease; and the Mortgage made expressly subject and without Prejudice to that Lease; that the principal Sum of £1,000 and a considerable Arrear of Interest was due to the Petitioner: that Adams died in March, 1811; and Stuart became Bankrupt in January, 1812; that the Petitioner gave Notice to the Tenant in Possession to pay the Rent to the Petitioner only: but notwithstanding such Notice, and that the Premises were a scanty Security, the Assignees had received the Rent, amounting to £120 7s. 4d.

The Petition prayed, that the Assignees may be ordered to pay to the Petitioner the said Sum of £120 7s. 4d. an Account of the Principal, Interest, and Costs, the usual Order for Sale; and that the Petitioner may be at liberty to prove for the Deficiency.

The Lord Chancellor. Admitting the Decision of Moss v. Gallimore to be sound Law, I have been often surprised by the Statement, that a Mortgagor was receiving the Rents for the Mortgagee. That is one of those Cases, which have led me to doubt, whether Lord Mansfield was not sometimes applying, as the Doctrine of a Court of Equity, what never had been so. In the Instance of a Bill filed to put a Term out of the Way, which may be represented as in the Nature of an equitable Ejectment, the Court will in some Cases give an Account of the past Rents: but a Mortgagee never can in this Court make the Mortgagor account for the Rents for the Time past. There is not an Instance, that a Mortgagee has per directum called upon the Mortgagor to account for the Rents. The Consequence is, that the Mortgagor does not receive the Rents for the Mortgagee.

The Petition was dismissed.

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CHINNERY v. BLACKBURNE.

KING'S BENCH, 1784.

[1 H. Blackstone, 117 n.]

GENERAL indebitatus assumpsit for freight of goods. — Plea general issue. — Verdict for the plaintiff, subject to the opinion of the court, on a case, which stated, that by an indenture of assignment dated January 4, 1783, Robert Merryfield, in consideration of £1,166 18s. which he owed to the plaintiff, assigned to her the ship B. &c. in which indenture there was a covenant from the plaintiff to reassign the said ship, &c. to Merryfield, on payment of £1,166 with lawful interest, on or before the 10th of November then next ensuing: that at the time of the execution of the deed, the ship was in the River Thames, and afterwards sailed to Portsmouth, and continued there till the middle of March following, in the possession, and under the command of A. B. and that the plaintiff did not then take possession: that Merryfield navigated, victualled, and manned the ship, as owner thereof, at his own expense, and risk, both from England to Antigua, and on her return from thence: that Merryfield, at Antigua, gave the command of her to Captain Drysdale, and sent her to England, with orders to the captain, to address himself to Messrs. Dunlop of London, merchants, who were to sell her according to the directions contained in a letter, in which letter Merryfield also said. "Mrs. Chinnery has a demand against me, for near £1,200 sterling, which I hope to remit shortly to you, or Mrs. Merryfield, so as to pay her;" that Messrs. Dunlop being applied to as consignees, lent two sums of £50 to Captain Drysdale, declaring they should consider him as responsible, in case they should not receive the same by freight, &c. and that they afterwards received the money from Drysdale: that the ship completed the delivery of the cargo, on the 27th of September, 1783; that the plaintiff took possession on the 29th September following, immediately on receiving information of her arrival in the Thames; that the defendant had goods from Antigua on board, the freight of which amounted to £76 9s. 11d. for the recovery of which the action was brought: that Captain Drysdale paid for lights, customhouse dues, and for clearing the ship, which the plaintiff repaid him, and also paid his and the mariners' wages, for the voyage from Antigua, to the amount of £234 7s. 7d. after she took possession of the ship; and that the plaintiff afterwards sold the ship by auction for £710, &c.

Lord Mansfield. The justice of the case struck me forcibly at first, as between the mortgagor and mortgagee: but the mortgagor is no party, the action is brought after the mortgage, against a person who contracted with the mortgagor. This action must be founded on the idea, that the mortgagor in possession is the servant and agent for the mortgagee, which is not the case. Till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expenses, and he is to reap the profits.

B. Lien Theory.

RUNYAN v. MERSEREAU.

SUPREME COURT, NEW YORK, 1814.

[11 Johns. 534.]

Per Curiam. This was an action of trespass, quare clausum fregit. The plaintiff proved himself in possession of the locus in quo, and showed a title derived under a judgment against one James Leonard, who, it appeared, had mortgaged the land to Joshua Mersereau. By the pleadings, the question presented to the court is, whether the free-hold was in the plaintiff, who had purchased the equity of redemption, under the judgment against the mortgager, or in Joshua Mersereau, the mortgager.

Courts of law, both here and in England, have gone very far towards, if not the full length of, considering mortgages, at law, as in equity, mere securities for money; and the mortgagee as having only a chattel interest. Lord Mansfield (Doug. 610) says a mortgagee,

notwithstanding the form, has but a chattel, and the mortgage is only a security; that it is an affront to common sense to say the mortgagor is not the real owner. Mortgages are not considered as conveyances of land within the statute of frauds, and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage. Mortgages will pass by a will not made with the solemnities of the statute of frauds. The assignment of the debt, or forgiving it, even by parol, draws the land after it, as a consequence. The debt is considered the principal, and the land as an incident only.

The interest of the mortgagee cannot be sold under execution. It is unnecessary to go into an examination of the cases on this subject; they have been repeatedly reviewed by this court. 3 Johns. Cases, 329; 1 Johns., Rep. 590; 4 Johns. Rep. 42. The light in which mortgages have been considered, in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the

plaintiff, and he, of course, is entitled to judgment.

Judgment for the plaintiff.1

WHITE v. RITTENMYER.

SUPREME COURT, IOWA, 1870.

[30 Iowa, 268.]

Action in trespass, for cutting and removing from certain lands of plaintiff a large quantity of wood and timber. Verdict and judgment for plaintiff in the sum of \$2,000. Defendant appealed to the general term, where the judgment of the District Court was affirmed. He now appeals to this court.

Beck, J. The petition avers that the title of the land in question is in plaintiff. The answer denies plaintiff's title, and sets up ownership in defendant. An issue is then formed involving the title of the lands, but it is not shown by the pleadings upon what facts the parties base their respective claims. From the evidence we learn that the title of each party has a common source in James McDonald. Plaintiff's title is derived from Agnes Gary, mother of James McDonald. James died in 1849. In 1846 he executed a mortgage to his brother Eneas upon the land, to secure \$300, with ten per cent per annum interest, due January 1, 1847. The instrument contains an express condition to the effect that, upon the non-payment of the debt at its maturity, the mortgagee may enter and take possession of the land. Eneas, dying, left his wife Mary as his sole heir. James left no other heirs than his

¹ Accord: Witherall v. Wiberg, 4 Sawy. 232; Kidd v. Temple, 22 Cal. 255; Brown v. Snell, 6 Fla. 741; Chick v. Willetts, 2 Kans. 384; Reading v. Watermann, 46 Mich. 107; Bartlett v. Tumberlake, 57 Mo. 499; Dutey v. Graham, 12 Tex. 437. — Ed.

mother and Eneas, if the latter was capable of inheriting. The foregoing are the undisputed facts of the case. Other facts, asserted by the respective parties, are as follows: Plaintiff insists that, at the time of the death of James, Eneas was, and continued up to his decease, a non-resident alten. Defendant claims that Eneas, after forfeiture of the conditions of the mortgage by non-payment, entered upon and took possession of the land under the mortgage, and that he survived the mother, who died in 1853. There was evidence at the trial tending to prove these alleged facts, which, under the issues of the case, were passed upon by the jury. The assignment of errors relates to the instructions given and refused by the court, and the overruling of the District Court of a motion for a new trial, based upon the ground that the verdict is not supported by the evidence.

The first point of inquiry relates to the character of the interest or estate, in lands conveyed by a mortgage. Does the mortgage acquire an inheritable estate?

The uniform language of the books is, that by a mortgage at common law the legal title is conveyed to the mortgagee, who is vested with the legal estate and freehold of inheritance. 1 Greenleaf's Cruise Dig. 570. But this rule of the common law is not recognized by the weight of the American authorities. In this country it may be considered the prevailing rule that the mortgagor, is the owner of the lands mortgaged, and retains the inheritable estate therein. At common law the performance of the condition of defeasance of a mortgage was considered to operate by devesting the estate in the mortgagee which was conveyed by the instrument. The doctrine of the American authorities, in effect, is, that it serves to vest, by its breach, the estate in the mortgagee, which, before, was in the mortgagor. The doctrine seems to be in harmony with the intent of the transaction when land is mortgaged. Its object is to pledge the land for the debt, and is nothing more than the creation of a security. The interest which the mortgagee holds is a lien upon the land for the debt, which may, by certain proceedings, ripen into a title, or rather, may devest the title of the mortgagor. If the condition of the mortgage be broken, some act of the mortgagee is necessary, that he may acquire an indefeasible title - a title which the mortgagor will not be able to defeat by redemption.

It may be admitted that this doctrine is anomalous. That a legal conveyance will not pass a legal title is not in accord with legal principles. In the contrary view, however, an anomaly is found which is quite as noticeable. A legal estate, which is vested by a legal conveyance, is defeated by the act of the grantor after the title has passed from him. Yet this is the case with a mortgage under the doctrines of the common law, for, if the debt be paid before forfeiture or foreclosure, the mortgagee's title ceases. Anderson v. Neff, 11 S. & R. 223; Cameron v. Irwin, 5 Hill, 276; Goodwin v. Richardson, 11 Mass. 470.

It may be said that the mortgage conveys a base or determinable fee, and that the estate created by the mortgage is so classed among estates at common law. But this fact does not remove the difficulty in harmonizing the common-law doctrine with the principles applicable to mortgages as they are now regarded. As between the mortgagor and mortgagee, the latter, for the purpose of enforcing his lien, may exercise many rights of ownership, but it will be remembered that these rights are exercised to the end that the security may be enforced, and not because the mortgagee is vested with the ownership of the land.

Our conclusion is, that the interest of the mortgagor in the lands is an estate of inheritance, which is in no way affected by the mortgage before entry and foreclosure, further than by the lien created. These views are, in their application to this case, strengthened by the language of chapter 103, section 2, Revised Statutes 1843, page 442, under which the mortgage in question was executed. It provides that mortgages upon real property shall operate as liens from the date of their filing for record. This provision may be interpreted as a legislative declaration of the law as then understood, to the effect that the interest held by a mortgagee in the land is no other or greater than a lien.

A question is presented as to the effect, upon the titles and interests of the parties, of an entry under the mortgage after forfeiture for conditions broken. No additional right is conferred upon the mortgagee because entry on account of the default of the mortgagor is authorized by the instrument; under the law, without such a provision, the right existed. Whatever effect an entry may have, and we need not, as will presently appear, examine that question, it is our opinion that after having been made its effects may be waived. There can be no doubt on this point upon principle, namely: After entry, if the possession of the land be restored to the mortgagor upon his claim of ownership, it is very clear that this would operate to waive the rights acquired by the mortgagee. This doctrine has the support of authority. Botham v. McIntire, 19 Pick. 346; Charles v. Dunbar, 4 Met. 498.

The instructions to the jury given by this court are in harmony with the foregoing views. In effect they hold that the defendant, claiming under the mortgage, did not, without entry, acquire title to the land. The jury were required to find the fact of entry, and, if found, the further fact of waiver thereof, by instructions which are not objectionable. Nor do we understand defendant's counsel to complain of them, further than by their conformity to the doctrines above announced.

Affirmed.

CARUTHERS v. HUMPHREY.

SUPREME COURT, MICHIGAN, 1864.

[12 Mich. 270.]

Christiancy, J. The bill was filed to foreclose two mortgages (on the same land) executed by the defendants to William L. Coonley, both dated the fifth day of June, 1860; one for four hundred and twelve dollars and the other for two hundred dollars: both payable one year from date with interest at ten per cent. The former was assigned to complainant on the day of its date, and the latter on the sixteenth day of May, 1862, long after it became due. The mortgages were respectively accompanied by a promissory note for a like amount, payable in the same way, which notes were transferred to complainant with the respective mortgages.

The defence set up is usury, and a tender of the amount actually due,

after default, and before the filing of the bill.

It is clearly proved, and the fact is not disputed, that, on the twenty-eighth day of July, 1862, Humphrey tendered to complainant the full amount due on the two mortgages, exclusive of the bonus in each case, and the interest thereon — in other words, exclusive of what we have found to be usury. This tender was refused by complainant, and Humphrey, with full notice to complainant, deposited the money on the same day with a Mr. Simonson, near complainant's residence, to be paid to complainant when he should choose to receive it. But the money was not brought into court, nor does it appear by the evidence that the tender was kept good up to the time of the hearing, though it is shown to have been still in Simonson's hands when the evidence was taken.

The naked question, therefore, is, whether the tender alone, made after default, or failure to pay on the day when due, had the effect to discharge the mortgages, or release the land from their encumbrance.

We think this question must be answered in the affirmative.

A mortgage is no longer in this State what it was originally at common law, a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become absolute on failure to pay at the specified day. It is but a security for the debt. The estate in the land is still in the mortgagor: and payment at any time before foreclosure or sale, or (in case of foreclosure by advertisement) at any time before the expiration of the time of redemption — including, of course, any legal, costs which may have been made — will discharge the mortgage in the same manner as if made on the day of payment mentioned in the mortgage; and no re-conveyance is necessary to vest the title in the mortgagor, in the one case more than the other.

The mortgage, therefore, is but a lien upon the land as security for the debt; and, so far as relates to the effect of a tender, we think this lien is precisely analogous to that of a lien upon, or a pledge of, goods as

security for a debt. And in such case it is well settled that, while a tender of the amount due does not, without acceptance; extinguish the debt, nor release the debtor from personal hability, it extinguishes the lien, and the creditor loses his right to all collateral securities. See Moynahan v. Moore, 9 Mich. 9.

We have been saved the labor of a full discussion of this question, by the decision of the same question here involved by the Court of Appeals in New York, in Kortright v. Cady, 21 N. Y. 343. And in the able opinions of Davies and Comstock, Judges, given in that case, we fully concur.

We think, therefore, the lien of the mortgage was wholly discharged by the tender; and that complainant can look only to the personal responsibility of his debtor. And, this being a proceeding to foreclose—or, in other words, to enforce the lien of the mortgages, the court below was right in dismissing the bill, and the decree of that court must be affirmed, with costs.

The other justices concurred.

CHAPPELL v. JARDINE.

Supreme Court, Connecticut, 1883.

[51 Conn. 64.]

SUIT for a forcelosure; brought to the Superior Court. The defendants demurred to the complaint; the court (Andrews, J.) overruled the demurrer and passed a decree of forcelosure. The defendants appealed to this court. The case is sufficiently stated in the opinion.

PARK, C. J. This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island in Long Island Sound. The complaint alleges that the land mortgaged, at the time the deed was given, lay in the town of Southhold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In McCormick

v. Sullivant, 10 Wheat. 192, the court say: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in United States v. Crosoy, 7 Cranch, 115, Kerr v. Moon, 9 Wheat. 565, Darby v. Mayer, 10 id. 465, and in many other cases. Indeed the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor. This appears clearly from the following cases:

In Gardner v. Heartt, 3 Denio, 232, the court say: "The mortgagee, as such, has no title to the land mortgaged; he has neither jus in re nor ad rem, but a mere security for his debt; the title to the land, notwithstanding the mortgage, remains in the mortgagor." In Power v. Lester, 23 N. Y. 527, the court say: "A mortgage is a mere security, an encumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on execution." In Trimm v. Marsh, 54 N. Y. 599, the court say: "The common law rule . . . still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a re-conveyance by the mortgagee. The same rule prevails in the New England States, and in many of the other States of the Union. But this common law rule has never, to its full extent, been adopted in this State. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature.

It follows, therefore, that while the land in question remained in the State of New York it was encumbered by a mortgage of this character; and when it came into this State it bore with it the same burden precisely. There was nothing in the change of jurisdiction that could affect the contract of mortgage that had been made between the parties. The title to the property continued to remain in the mortgagor, and it remains in him still. This is clear. The laws of this State could not make a new contract for the parties or add to one already made. They had to take the contract as they found it.

Now it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed the forfeiture, stated in the deed, becomes absolute at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is to extinguish this right of redemption if the mortgage debt is not paid by a specified The decree acts upon this right only. It conveys nothing to and decrees nothing in the mortgagee if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect. Phelps v. Sage, 2 Day, 151; Roath v. Smith, 5 Conn. 136; Chamberlin v. Thompson, 10 id. 244; Porter v. Seeley, 13 id. 564; Smith v. Vincent, 15 id. 1; Doton v. Russell, 17 id. 146; Cross v. Robinson, 21 id. 379; Dudley v. Caldwell, 19 id. 218; Colwell v. Warner, 36 id. 224.

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our remedy of strict foreclosure may not be adapted to give redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate; for it would be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it may be taken and sold, that payment may be made, after giving the pledgor a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and the legal title and possession of the property be decreed in the mortgagee, such course might be taken.

We think either of the modes suggested might be pursued; but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

There is error in the judgment appealed from, and it is reversed,

and the case remanded.

In this opinion the other judges concurred.

BARNETT v. TIMBERLAKE.

SUPREME COURT, MISSOURI, 1874.

[57 Mo. 499.]

SHERWOOD, Judge, delivered the opinion of the court.

The defendant on the 7th day of March, 1871, was indebted to one Galbreath in the sum of \$350, for which he gave his promissory note, due in one year after date. Several persons joined with the defendant in the execution of this note, only, however, as sureties.

A few days after the execution of the note, the defendant executed to the plaintiff, as trustee, a deed of trust of certain personal property.

The granting words in this instrument were: "bargain and sell, convey, deliver and confirm." The condition of the deed was that the defendant should pay the note at its maturity, and thus save his sureties harmless; in which case, the property so conveyed was to be released at his cost; but if default were made in the payment of the note the deed was to remain in full force, and the trustee to proceed to sell the property, &c., &c.

There was no delivery of the property mentioned in the deed, to the trustee, but the defendant retained possession until some time in the succeeding Fall, when it was taken from him by process issued in behalf of the plaintiff, who claimed in his petition that he was entitled to its possession. The defendant's answer was a general denial. The note was duly paid at its maturity, and the defendant exhibiting it to

the plaintiff, demanded his property; but this demand was only partially complied with, the plaintiff retaining a portion of it which he sold after the note was satisfied and the proceeds were applied to the payment of the costs which had accrued in respect to the property and its keeping, in consequence of suit brought.

The whole case turns upon this: whether the court below erred in holding that the trustee need not await the maturity of the note, but could under the deed, to immediate possession of the property.

The law is well settled, that, although a trustee or mortgagee of personal property, is, after default made or condition broken, entitled to the possession, and considered in law the owner of the property just mortgaged, yet prior to that time, it is equally certain that no such right of either possession or ownership exists.1 The case of Sheble v. Curdt (56 Mo. 437) is decisive of this point. granting words there employed were, "sells, transfers and sets over;" but no difference is perceived between the legal effect of those words. and those in the case at bar. In neither case did the grant become an absolute one, until condition broken. If the trustee or mortgagee is justly apprehensive that the property will be eloigned prior to the maturity of the demand which the deed is given to secure, he is not without remedy; but that remedy certainly does not consist in such an action as that to which the plaintiff has in the present instance resorted: for the obvious reason that such action must be based on the right of the plaintiff to the immediate possession of the property sued for. But as above seen, no such right attaches in the trustee until default occurs.

It follows that the plaintiff should not have recovered judgment in the court below even for costs, and that his sale of a portion of the trust property was entirely unwarrantable. It is unnecessary to notice the instruction asked by defendant as to the measure of damages for taking the property, because that instruction was evidently refused, not on account of its incorrectness, but for the reason that it was regarded inapplicable under the construction which was placed upon the deed of trust.

The judgment is reversed and the cause remanded; all the judges concur.

¹ This law obtains in some jurisdictions. Hall v. Tunnell, 1 Houst. 220; Kranz v. Uldelhofen, 193 Ill. 477; White v. Rittenmeyer, 30 Iowa, 268; Hill v. Robertson, 24 Mass. 368; Bailey v. Winn, 101 Mo. 649; Shields v. Lozear, 34 N. J. L. 496; Bradfield v. Hale, 67 Oh. St. 316; Carpenter v. Carpenter, 6 R. I. 542; Brunswick Co. v. Herrick, 63 Vt. 286. — Ed.

FELINO u K. S. NEWCOMB LUMBER COMPANY.

SUPREME COURT, NEBRASKA, 1902.

[64 Neb. 335.]

ALBERT, C. On the first day of August, 1891, Alva A. Richardson and his wife executed and delivered to Luigui Felino a mortgage on certain real estate in South Omaha, to secure the payment of their note, executed to the same party, for \$2,000, with interest at seven per cent per annum, payable semi-annually, according to the tenor of ten interest coupons for \$70 each, attached thereto. The mortgage was duly filed and recorded on the 5th day of August, 1891. In addition to the conveyances and agreements usually found in a mortgage, the mortgage contained the following clause: "And upon forfeiture of this mortgage. or in case of default in any of the payments herein provided the said Luigui Felino shall be entitled to the immediate possession of said premises." On the 15th day of August, 1891, the K. S. Newcomb Lumber Company sold and delivered to the said mortgagors certain material for the erection of a building on the mortgaged premises, and on the 24th day of December thereafter filed a lien therefor against said premises. On the 30th day of October, 1893, the said lumber company filed its petition in the district court against said mortgagors, and others, praying for the foreclosure of its said lien. The mortgagee, above mentioned, was not made a party to the suit. On the 29th day of December, 1894, a decree was rendered in said suit in favor of the lumber company, and on the first day of October, 1895, the premises were sold in pursuance of said decree to the said lumber company, and, in pursuance of an order confirming the same, on the 26th day of October, 1895, a deed issued to said purchaser. On the 21st day of September, 1895, Felino, the mortgagee, commenced an action for the foreclosure of his mortgage, making the said lumber company a party defendant, which action was prosecuted to a decree on the 26th day of May, 1896. In pursuance of this decree, in October, 1896, the premises were sold to Felino, the mortgagee, who on the 31st day of October, thereafter, received a sheriff's deed therefor. On the 2d day of October, 1895, and after the commencement of his suit to foreclose the mortgage, the mortgagors, having made default, surrendered possession of the premises to the mortgagee. On the 26th day of October, 1895, and after having received its deed to said premises, the lumber company demanded possession of the premises from the mortgagee, who was then in possession, which was refused. On the 21st day of May, 1898, the lumber company commenced the present action against Felino to recover the rents and profits of said premises subsequent to the time it received its deed from the sheriff, issued in pursuance of the decree of foreclosure of its said lien. A trial was had to the court, which resulted in a finding and judgment for the plaintiff. The defendant brings the case here on error.

The theory of the plaintiff in the court below, and the only theory on which the judgment of the district court can be upheld, is that the mortgagor of real property retains the legal title and the right of possession until confirmation of a sale under a decree of foreclosure of the mortgage, and that such right of possession carries with it the right to the rents and profits of the mortgaged premises, and that as plaintiff. by virtue of the sale in pursuance of the decree foreclosing its lien, acquired all the right, title and interest of the owner of the fee in and to the premises in controversy, it thereby acquired their right of possession, and consequently their right to the rents and profits accruing subsequently to the issuance of such deed and prior to the sale to the defendant in this case in pursuance of the decree foreclosing his mortgage. In our opinion, this theory is unsound. In the absence of any statutory regulation, the mortgagee is entitled to the possession of the premises. Jones, Mortgages, sec. 667. The only statutory regulation on the subject in this state is that to be found in section 55, chapter 73. Compiled Statutes, which is as follows: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." This provision leaves it competent for the parties to a mortgage to stipulate for the investiture of the mortgagee with the legal title and right of possession, which carries with it the right to the rents and profits. As we have seen, in this case the mortgage expressly provided that upon the forfeiture of the mortgage, or in case of default in any of the payments, the mortgagee should be entitled to the immediate possession of the premises. Of this provision subsequent purchasers and incumbrancers, including the plaintiff in this case, were as fully charged with notice as with any other provision of the mortgage. In California it is provided by statute that the mortgagee shall not be entitled to possession unless authorized by the express terms of the mortgage. Under this provision it was held that if the mortgagee, after condition broken, take possession by consent of the mortgagor, it is presumed, in the absence of clear proof to the contrary, that he is to receive the rents and profits and apply them to the debt secured, and that he is to hold possession until the debt is paid. Dutton v. Warschauer, 21 Cal. 609; Frink v. LeRoy, 49 Cal. 314. These cases, while not directly in point, clearly recognize the right of the mortgagee to the possession of the premises under a stipulation like the one under consideration. In McIntyre v.

¹ This law obtains in most jurisdictions. See Fogarty v. Sawyer, 17 Cal. 589; McIntyre v. Whitfield, 13 Smedes & M. 88; Shriver v. Shriver, 86 N. Y. 575; Cook v. Cooper, 18 Oreg. 142. — Ed.

Whitfield, 13 Smedes & M. [Miss.], 88, it was held that a stipulation similar to the one contained in defendant's mortgage might be enforced by the mortgagees taking possession and holding it. That the mortgagee in possession would be required to account for the rents and profits, will be conceded, but such account should be taken in the suit to foreclose or in a suit to redeem. The defendant in this case, as we have seen, brought his action to foreclose his mortgage. All the parties, including the plaintiff in this case, were before the court in that suit. Every question involving the amount due on the defendant's mortgage, including the rents and profits received by him, were in issue in that case. The proceedings in that case are conclusive and binding, as to such questions, on all of the parties thereto. It follows that the judgment of the district court in this case is erroneous, and it is recommended that it be reversed, and the cause remanded for further proceedings according to law.

NOYES, RESPONDENT, v. WYCKOFF, APPELLANT SUPREME COURT, NEW YORK, 1883. [30 Hun, 466.]

Appeal from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover damages for the conversion of a quantity of iron ore. The defendant justified the taking under a chat-

tel mortgage given by a former owner, and the plaintiff claimed under a bill of sale subsequently executed by the mortgagor. The plaintiff claimed that the lien of the mortgage was destroyed by a tender made by him:

With reference to this the court at General Term said: "The conversion rests upon a subsequent tender by the owner of the mortgage equity. Mrs. Fitzgerald gave the mortgage and it was collateral to the note. The plaintiff bought the equity with full knowledge of the mortgage and in express terms subject to it. His tender fails for two reasons: First. The mortgage is a part of the consideration, and the property was taken subject to its payment, although there was no express covenant to pay the mortgage debt in the bill of sale. Second. A stranger to the title cannot make a tender and destroy the lien. tender leaves the debt. Mrs. Fitzgerald must pay her note if this tender is good. A tender by the owner of the equity is not good as against the interests of the mortgagee. Harris v. Jex, 66 Barb. 232. chattel or personal mortgage differs in its structure and effect entirely from a mortgage upon real estate. The real estate mortgage is only a-lien and conveys no title whatever. The personal mortgage transfers the title at once subject to a defeasance by the performance of the condition annexed., A tender before or after due, by the owner of the equity, would not destroy the lien. There is strictly speaking no lien. There is a transfer of title; and only by keeping the tender good can the property be held free of the mortgage."

The judgment should be reversed, and a new trial granted, costs to

abide event and order of reference vacated.

Opinion by Barnard, P. J.; Dykman, J., concurred; Pratt, J., dissented.

Judgment reversed, and new trial granted, costs to abide event, order of reference vacated.¹

RANDALL v. PERSONS.

Supreme Court, Nebraska, 1894.

[42 Neb. 608.]

RAGAN, C. This is an action of replevin brought in the District Court of Hall County by Carl M. Persons against M. Randall. Persons alleged in his petition that he was the owner of and entitled to the immediate possession of the property replevied, the same being "an office

¹ Accord: Weeks v. Baker, 152 Mass. 20. - ED.

chair." The answer of Randall was a general denial. Persons had a verdict and judgment, and Randall brings the case here for review.

The evidence in the bill of exceptions establishes, and tends to establish, the following facts: Persons sold the property and other property to one Meth, taking the latter's note for the purchase price of the pronerty and a chattel mortgage thereon to secure the payment of the note. This mortgage, or a copy of it, was duly filed in the office of the county clerk of Hall County, where the property was situate. Persons afterwards sold and indorsed Meth's note to a bank in Grand Island, and the note not being paid at maturity, the bank sued Meth, and Persons as an indorser thereon, and obtained judgment against them for the amount of the note in suit. Persons then paid the amount of this judgment and interest to the bank, and he and Meth entered into an agreement, the substance of which was that the contract of sale of the property between Meth and Persons should be and was rescinded, the title to the property reinvested in Persons, and Meth was to pay Persons a small sum of money. The property, however, was not at this time removed from the place of business or office of Meth, where it was when the agreement between him and Persons was made. Soon after this time an execution was levied upon this property by one of Meth's judgment creditors, and the property in controversy, and other property, was by the consent of Meth and the execution creditor, sold to Randall, he paying the agreed price thereof to the attorney of the execution creditor. We say that the evidence in the record establishes, and tends to establish, the foregoing facts, for the evidence as to nearly all of these facts was conflicting.

On the trial to the jury Persons, against the objection of Randall, was permitted to read in evidence to the jury the note and chattel mortgage executed by Meth to him upon the property in controversy, and this is the first error assigned here. It is to be remembered that Persons, in his petition, alleged in himself an absolute ownership of the property. The legal title to property pledged by a chattel mortgage remains in the mortgagor until devested by foreclosure proceedings and sale in pursuance of law, and until the title of the mortgagor is thus devested, the mortgagee has merely a lien upon the property. In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings; and where a plaintiff in an action of replevin bases his right to the possession of the property claimed by reason of a special ownership therein or lien thereupon, he should set out in his petition the facts with reference to such special ownership or lien, Haggard v. Wallen, 6 Neb. 271; Musser v. King, 40 Neb. 892. The note and chattel mortgage, then, introduced in evidence in this case were irrelevant under the issues made by the pleadings, and did not tend to prove Persons' case.

Throughout the trial counsel for Persons laid great stress upon the fact of the existence of record of the chattel mortgage on this property made by Meth; and there is evidence in the record which tends to show

that Randall had actual knowledge of the existence of this mortgage, but whether he had such actual knowledge, he was bound by the notice which the record imparted, and of course could not be an innocent purchaser of this property as against the holder of said chattel mortgage, There is no doubt but that the admission in evidence of the note and chattel mortgage was error. The difficulty in the case is to determine whether this error was prejudicial to Randall. dence enough in the record, if believed by the jury, to sustain a finding that Persons was the absolute owner of this property at the time he brought this suit by virtue of the contract between him and Meth, by which the sale of the property to the latter was rescinded; but we cannot say certainly whether the verdict of the jury, that "at the time of bringing said action the said plaintiff was entitled to the possession of said property," was based upon their finding that the absolute title to the property was in Persons by reason of the said contract of rescission between him and Meth, or whether the jury's verdict was predicated upon the note and chattel mortgage introduced in evidence. For that reason we think the admission in evidence of the note and chattel mortgage was prejudicial error. If Mr. Persons made the contract with Meth, which he alleges he did, rescinding the sale of the property previously made to Meth, then, of course, that operated as a satisfaction of the note and mortgage, as the note had been reduced to judgment, and was then owned by Persons; and if Mr. Persons based his title to this property upon its repurchase from Meth, it is difficult to understand why he insisted upon also claiming possession of the property, by virtue of the note and chattel mortgage. The two theories were inconsistent. If he owned the property, as he pleaded he did, the chattel mortgage had nothing whatever to do with the case. If he did not own the property and claimed special ownership in it by virtue of the chattel mortgage, then he should have pleaded the facts, and apprised the defendant of just what his claims on the property were; and had he done so, then all his testimony as to his being the absolute owner of the property because of the said contract of rescission of its sale made between him and Meth would have been irrelevant under the issues. A litigant cannot plead one thing and prove another. He cannot plead that he is the absolute owner of property, and satisfy such plea by proof that he simply has a lien upon it; nor can he plead that he is entitled to the possession of property by virtue of a lien upon it and satisfy such plea by proof that he is the absolute owner of the property. The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.1

1 Accord: Moore v. Norman, 43 Minn. 438. - ED.

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SECTION II. - EQUITABLE MORTGAGE.

RUSSEL v. RUSSEL.

CHANCERY, 1783.

[1 Bro. C. C. 269.]

A LEASE having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt [and other sums in which he was indebted to him], the pledgee brought this bill for a sale of the leasehold estate.

Mr. Lloyd, for the plaintiff, merely stated the case, and that the

plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the 4th clause of the statute of frauds.

LORD LOUGHBOROUGH. In this case it is a delivery of the title to the plaintiff for a valuable consideration. The court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed.¹

MEADOR v. MEADOR.

SUPREME COURT, TENNESSEE, 1871.

[3 Heisk. 562.]

In Chancery at Carthage, before B. M. Tillman, Chancellor.

The bill alleged that the defendant, Joseph Meador, was in possession of the deed of W. A. Meador, late husband of complainant, and that he claimed to hold it under a parol mortgage and deposit of the deed. That he had sold the land to a co-defendant, Jones, and made him a deed, and prayed the delivery of the deed deposited, and the cancellation of the other deed as a cloud. That W. A. was dead, and Henry L. Meador, defendant, his heir at law, and defendant Duke, his administrator. The answers set up the deposit as an

¹ Accord: Anon., 2 Eq. Abr. 284; Hankey v. Vernon, 2 Cox, 12; Rogers v. Barrett, 3 Esp. 102; Ex parte Kensington, 2 V. & B. 79; Ex parte Langston, 17 Ves. 230; Bozon v. Williams, 3 Y. & J. 150; Ex parte Broderick, 180 B. D. 766; Spoke v. Whayman, 20 Beav. 607; Roberts v. Croft, 24 Beav. 223; Ex parte Smith, 2 M. D. & De G. 587; Lacon v. Allen, 3 Drew. 579; Ex parte Chippendale, 2 Mont. & Ayr. 299; Bank v. Caldwell, 4 Dillon, 314; Martin v. Bowen, 51 N. J. Eq. 452; Hall v. McDuff, 24 Me. 311; Cary v. Robinson, 8 Mass. 159; Rockwell v. Hoby, 2 Sandf. Ch. 9; Hackett v. Reynolds, 4 R. I. 512; Jarvis v. Dutcher, 16 Wis. 307. — ED.

equitable mortgage, and, by way of cross bill, asks "if no lien exists," a sale of the land and the application of the fund to the payment of the debts of defendant.

The decree below, reciting that it appearing that the deed "was delivered to the said Joseph Meador by the said W. A. Meador, deceased, intending thereby to secure the said Joseph Meador for his liabilities as security, and otherwise, of the said W. A. Meador, deceased;" declared that the delivery of the deed of W. A. Meador to defendant Joseph Meador did not create a lien or mortgage on the land in favor of Joseph Meador, and that complainant was entitled to dower and the residue of the fund, subject to the payment of all just debts outstanding—it adjudged that the title to the land was "in the heirs of W. A. Meador, deceased, and that the deed from Joseph Meador to his co-defendant, was void, and a cloud upon the title of the heirs at law of W. A. Meador, deceased, and shall be for naught held."

From this decree the defendants appealed.

TURNEY, J., delivered the opinion of the court.

The delivery by a debtor to his creditor, of a deed made to the debtor for land, upon the agreement and understanding between the debtor and creditor that the creditor is to hold the deed as security or indemnity for debts due from the debtor or for which the creditor is bound as surety for the debtor, creates no lien or mortgage, legal or equitable, upon the land embraced in the deed.

A contrary holding would be a judicial repeal of our statutes of frauds and perjuries, making void, sales not evidenced by writing, of lands, tenements, or hereditaments.

Affirm the decree, and remand the cause for the assignment of dower and account for rents and profits.¹

HERMANN v. HODGES.

CHANCERY, 1873.

[L. R. 16 Eq. 18.]

This was a suit for specific performance of an agreement (entered into on the occasion of an advance being made by the plaintiff to the defendant) to execute a mortgage "with an immediate power of sale."

LORD SELBORNE, L. C., said that he had no doubt of the propriety of making the decree asked for, unless the defendant was prepared to pay off the advance at once.

¹ Accord: Davis v. Davis, 88 Ga. 191; Van Meter v. McFadden, 8 B. Mon. 435; Gardner v. McClure, 6 Minn. 250; Gorhard v. Flynn, 25 Miss. 58; Bloom v. Noggle, 4 Ohio St. 45; Woodward's Ex'r v. Trumbull, 50 Pa. 509; Bicknell v. Bicknell, 31 Vr. 498.—ED.

TEBB v. HODGE.

COMMON PLEAS, 1869.

[L. R. 5 C. P. 73.]

Kelly, C. B. The plaintiff, in December, 1867, entered into an agreement with Barrows expose assignee in bankruptcy the defendant Hodge is) to grant him a lease for twenty-one years of premises in Holborn of which Barrows was already in possession or of which he was to take immediate possession. One of the terms of the agreement was that Barrows should fit up the premises forthwith in a substantial and appropriate manner as a first-class luncheon-bar and restaurant, such fittings to be of the value of £500 at least, and to be completed to the satisfaction of the plaintiff on or before the 11th of February then next. Barrows being thus in possession, and the fixtures and fittings having been completed to the satisfaction of the plaintiff before April, 1868, the premises were in a condition to entitle Barrows to call for a lease, and to entitle the plaintiff to call upon him to accept a lease; and the plaintiff did in fact offer Barrows a lease. Another term of the agreement upon which the lease was to be granted was, that Barrows should pay £1,000 by way of premium. It seems that Barrows was not in a condition to pay that sum; and it was also made a term of the agreement that the plaintiff should advance or procure for him an advance of £1,000 for the period of two years, at 5 per cent interest, for which advance "the premises as fitted and licensed" were to constitute the security; and it was further agreed that if the lessee should assign or underlet the premises before the expiration of the two years, the mortgage of £1,000, with interest, should be paid off and discharged. The plaintiff was ready to complete the contract on his part and to grant Barrows the stipulated lease; but Barrows declined to take the lease then, "as he could deposit the agreement as a security." The case states that Barrows afterwards "applied to the plaintiff for liberty to assign the agreement, by way of mortgage; but the plaintiff refused his consent till the lease had been taken up. The plaintiff consented to the agreement being deposited as a security, subject to his claim of £1,000." Thus, the plaintiff refused to abandon the grant of the lease for twenty-one years, and to allow the substitution of the agreement as a completion of the transaction. It seems to me to be quite clear that there was an agreement between the parties that,

until the lease was executed, the agreement of December, 1867, was to be a security to the plaintiff for all that he was entitled to under it. Rebus sic stantibus, the plaintiff could at any moment have enforced the execution of a mortgage for the £1,000, inasmuch as there was an equitable contract between him and Barrows that "the premises as fitted and licensed" should stand as a security for that sum. The result, as it seems to me is, that the plaintiff became equitable mortgagee of the premises with the fittings and fixtures, and the defendants had no right to seize and sell them under the adjudication of bankruptcy against Barrows, and consequently this action is maintainable. The judgment of the Court of Common Pleas must be affirmed.

Mellor, J., and Channell, Pigott, and Cleasey, BB., concurred.

Judgment affirmed.

CITY INSURANCE CO. v. H. L. OLMSTED, ADMINISTRATRIX.

Supreme Court, Connecticut, 1877.

[33 Conn. 476.]

Bill in equity, brought to the Superior Court for New Haven County, praying that certain insurance stock belonging to the estate of Lucius D. Olmsted, deceased, and which he had in his lifetime contracted to transfer to the petitioners as security for an indebtedness to them, might be sold and the proceeds applied on the debt, or that the respondent, his administratrix, might be ordered to transfer the stock to the petitioners to be applied at its ascertained value to the debt.

HINMAN, C. J. We have no doubt of the general equity of the petitioners' case as against Lucius D. Olmsted, if he was still living or as against his heirs now that he is dead; but the main fact relied upon in the petition as the ground of equitable relief, as distinguished from the relief which all the creditors of his estate are entitled to. namely, the insolvency of his estate, and which is fully found by the court, must deprive the petitioners of the specific relief sought for in It cannot be claimed that the petitioner shave any lien this bill. upon this stock. The deceased was indebted to them, and for the better securing of that indebtedness he agreed to transfer to them, on or before the maturity of certain notes, the subject of that indebtedness in part, the stock in question. But this was never done, and he subsequently died deeply insolvent, and the petitioners now seek the specific execution of this contract on the part of his administratrix, who of course represents all the other creditors of the estate.

¹ Accord: Taylor v. Eckersley, 2 Ch. D. 302; Morrow v. Turney, 35 Ala. 131; Apperson v. Moore, 30 Ark. 56; Shocklen v. Davis, 17 Ga. 177; Gregg v. Sandford, 24 Ill. 17; Schaffenberg v. Bishop, 35 Ia. 60; Tiebers v. Burgess, 11 Md. 452; Sellers v. Lester, 48 Miss. 513; Roehholz v. Schwartz, 46 N. J. Eq. 477; Hall v. Omaha Bank, 49 N. Y. 626; Colles Appeal, 107 Pa. 590. — Ep.

This is the whole case. As the legal title to the stock was in Olmsted up to the time of his death, any creditor of his might have attached it: Dutton v. Connecticut Bank, 13 Conn. 498; or if he had been forced into bankruptcy, or had assigned it for the benefit of his creditors, his assignee would have held it. Swift v. Thompson, 9 Conn. 63; Shipman v. Ætna Insurance Company, 29 id. 245. deed the last case is a direct authority in favor of the respondent on every point involved in this, unless some distinction favorable to the petitioners can be drawn from the circumstance that the assignce in that case represented the creditors of a living bankrupt, while in the case at bar the administratrix represents the creditors of an insolvent estate. But there is obviously no ground for any such distinction. Had this stock been attached before Olmstead's death the lien would have been dissolved for the benefit of all his creditors, though valid against the petitioners had he lived. On his death all the creditors stand upon the same footing, and equality is equity.

We advise the Superior court to dismiss the petitioners' bill.

In this opinion the other judges concurred.1

IN RE SHERIDAN ET AL.

DISTRICT COURT OF THE UNITED STATES, 1899.

[98 Fed. Rep. 406.]

IN BANKRUPTCY. The referee in bankruptcy found that a pledge of personal property by the bankrupt to one of his creditors was an unlawful preference under the Bankruptcy Act, and made an order requiring the creditor, who had sold the goods pledged, to pay over the proceeds to the trustee in bankruptcy. The case is now before the court on the creditor's exceptions to such decision of the referee.

McPherson, D. J. The exceptant relies on Exparte Potts, Fed. Cas. No. 11,344, but an examination of that case will show that the

¹ Accord in principle: Hamilton v. National Loan Bk., 3 Dillon, 230; Re Little Power Co., 92 Fed. 585; Roundtree v. McLain, Hempst. 245; Loth v. McCarthy, 85 Ky. 581; Johnson v. Hooder, 72 Ind. 395; Moors v. Reading, 167 Mass. 322; New York Co. v. Saratoga Co., 159 N. Y. 137; Phelps v. Murray, 2 Tenn. Ch. 246.—Ed.

decision was upon a different state of facts. One question there was whether a pledge actually made was fraudulent; and it appeared that the alleged bankrupts, when they were admittedly solvent, had assigned to a creditor, as collateral security for advances, several policies. of insurance and bills of lading upon a vessel and cargo then at seat. Under such circumstances, it was correctly held that the transfer was not in fraud of creditors. The assignment of the policies was a completed transfer of the debtor's interest in those instruments, and the assignment of the bills of lading transferred the title to the property therein described, without any further act. As to almost all the property then under consideration, therefore, the transaction had been fully executed. One policy or one bill of lading was apparently not transferred until May, when the alleged bankrupts had become "involved" (there was no averment of insolvency in the petition); but as the last advance by the creditor had been made in March, in pursuance of an agreement made in February, the court was clearly right in holding that no part of the transaction was fraudulent. No question of preference arose, whereas here the question is one of preference simply. goods here were never actually pledged until the exceptant, for the first time, took them into his possession a few days before the petition was filed. Before that time there was a mere agreement to pledge. The goods were never delivered to the exceptant, nor (assuming, for present purposes, that this would have been good against the other creditors) were they even set apart and continuously treated as his property. Under the facts proved, the pledge was not completed until the date of removal. Lucketts v. Townsend, 49 Am. Dec. 730, note. This being so, the exceptant's title attached upon that date, and the transfer created a preference in violation of the act.

The exceptions to the finding of the referee are overruled, and his order directing the exceptant to pay to the trustee the money received from the sale of the goods in question is approved.¹

DAVIS v. CLAY.

SUPREME COURT, MISSOURI, 1829.

[2 Mo. 130.]

WASH, J., delivered the opinion of the court.

In this cause a bill was filed by the complainant against the defendant and one Scott, to foreclose a mortgage, &c. The Circuit

¹ Contra: Martin v. Reid, 11 C. B. N. s. 730. — ED.

Court decreed the foreclosure, sale, &c., from which Davis appealed to this court.

The facts are, that on the 23d of June, 1821, the above named defendant, Scott, executed a covenant, real mortgage, or instrument in writing, to the testator, Morrison, in the words following, to wit: "To all to whom these presents shall come: Whereas, I, John Scott, of the county of Ste. Genevieve and State of Missouri, am justly indebted to Col. James Morrison, of the county of Fayette, in the State of Kentucky, in the sum of three thousand eight hundred and thirty-eight dollars and sixty-six cents, lawful money of the United States, to bear interest from the date hereof; for which sum, said Scott has executed his note, of equal date with these presents, till full and perfect payment. Now know ye, for the better securing unto the said Morrison, his heirs and assigns, the full and perfect payment of the said sum, on or before the first day of March next ensuing; that I, the said John Scott, for (162) myself, my heirs, executors and administrators, do covenant, promise and agree to and with the said James Morrison, his heirs, executors, administrators and assigns, that the undivided interest of one third part of, in and to, a certain tract of land, known by the name of the Saline tract, in the county of Ste. Genevieve and State of Missouri, owned in common with Henry Dodge and the heirs of Edward Hempstead, containing about twelve thousand arpents more or less, being the same that was purchased by said Dodge, Hempstead and Scott, as the property of Mr. Peyroux; and also, as the property of Mr. Maxwell. as by deeds of record will fully appear, and every part and parcel thereof shall stand charged and chargeable with, and stand, continue, and be a security unto him the said Morrison, his heirs, executors, administrators and assigns, as well for the payment of the principal as the interest thereon, until the same shall be fully and finally paid and satisfied according to the true intent and meaning of these presents; reserving, however, to the said John Scott, his heirs and assigns, the rents and profits of the said land and saline, above and before securited and mortgaged," &c.; which was regularly acknowledged and recorded on the day of its date, and of which the defendant Davis had full notice; that after the execution of said instrument in writing, a judgment was obtained against said Scott, under which the premises were seized and sold to the defendant Davis, for the consideration of one dollar.

The questions presented for consideration are,

First. Whether the instrument be valid as a legal mortgage, &c.? Second. If not a mortgage in law, whether it can be an equitable lien?

The instrument is imperfect and defective as a legal mortgage, but it may well be regarded as an equitable mortgage.

An agreement respecting real estate, for good consideration, imposes a lien as against persons having notice, &c. 4 Brown Ch.

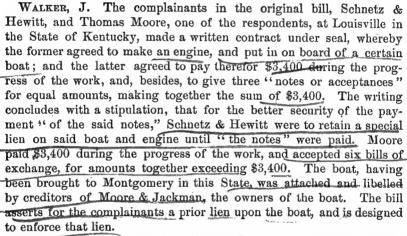
s. 31-4, Brow. Ch. 462, P. Wms. 282 and 429. If an equivalent be given, though the contract be not executed with all the formalities of law, yet in equity, the use is in the purchaser, &c., Gilb. Uses, 49 Eq. 30.

The decree of the Circuit Court is, therefore, correct, and must be affirmed with costs.

DONALD & CO. v. HEWITT.

SUPREME COURT, ALABAMA, 1859.

[33 Ala. 534.2]



The parties unquestionably had a right by contract to create a charge upon the boat, which would exist independent of the possession of the thing charged. The inquiry, unembarrassed by the technical meaning imputed to the word lien, is whether they have done so. Such a lien has every characteristic of an equitable mortgage, and may properly be so denominated. Every agreement for a lien or charge in rem constitutes a trust, and is accordingly governed by the general doctrine of trusts. Such a lien or charge is called an equitable mortgage, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage. Thus, an agreement that bills should be paid out of the proceeds of certain property has been held to create an equitable mortgage. Miller on Equitable Mortgages, 3. An agree-



¹ Accord: Burgh v. Francis, Finch, 28; Hildreth v. Hues, 33 Beav. 52; Margarum v Orange Co., 37 Fla. 165; Tiernan v. Poor, 1 Gill & J. (Md) 216; Abbott v. Godfroy, 1 Mich 178; Bullock v. Whipp, 15 R. I. 195; Bryce v. Massey, 35 S. C. 127; Morrill v. Morrill, 53 Vt. 74. — Ed.

² This case is abridged. — ED.

ment, "pledging and hypothecating" property for the payment of certain bills, was enforced as an equitable mortgage. Fletcher v. Morey, 2 Story, 555. A contract that a party "should have and maintain a lien" on chattels was characterized as "in the nature of an equitable mortgage," and as such enforced. Dunning v. Stearns, 9 Barb. Sup. Ct. Rep. 630. And an unsealed instrument of writing, pledging the real and personal estate of a railroad company for the faithful performs ance of a contract, was held by this court to be an equitable mortgage. M. & C. P. R. R. Co. v. Talman, 15 Ala. 473; see, also, Whitworth v. Gaugain, 3 Hare, 415; Campbell v. Worthington, 6 Vt. 448; Bank of Kentucky v. Vance, 4 Littell, 168; Marshall v. Lewis, 4 Littell, 140; In re Howe, 1 Paige, 125; Abbot v. Godfrey, 1 Man. (Mich.) 178; Coster v. Bank of Georgia, 24 Ala. 37; Kelly v. Payne, 18 Ala. 371.

The authorities cited upon the brief of the counsel for appellees show that the equitable mortgage, created by the contract of Moore with Schnetz & Hewitt, overrides the liens of the attaching and libelling creditors. See those cases; also, Willard's Eq. Jur. 443; 2 Story's Eq. Jur. 655, §1228; Jenkins v. Bodley, 1 S. & M.'s Ch. R. 338; Dunlap v. Burnett, 5 S. & M. 702.

Our argument thus far shows, as we think, that Schnetz & Hewitt have a lien, by virtue of their contract of July, 1849, which they are entitled to enforce in this suit. But the sum for which a lien is given by that contract is limited to \$3,400. The debt of the complainants is much larger, and is shown by the proof to have become so in consequence of work done in addition to that prescribed by the contract. The lien given by the contract cannot be enlarged, so as to secure this addition to the indebtedness, upon the ground that it was verbally agreed, or intended, or understood, when the additional work was done, that it should be so enlarged; or upon the ground that the additional indebtedness was contracted on the faith of the lien; for there is no averment in the original or amended bills of such facts. In the entire omission of any such averments, this case differs from Fletcher v. Morey, 2 Story, 555.

The decree of the court below is reversed, and the cause remanded, that a decree may be rendered consistent with the foregoing opinion. The appellant must pay the costs of this court.

WILLIAMS v. LUCAS.

EXCHEQUER, 1789.

[2 Cox, 160.]

THE testator had borrowed of James Lane the sum of £300 and by his note of hand of 7th November, 1783, he promised to pay the same on demand, and to give a security by mortgage of lands for the same when required.

Testator had no lands at the time, or any real estate except an advowson and some tythes; and he died in Wales in the December following.

The question was, whether this note gave the creditor any lien on the real estate; or whether it was a mere simple contract debt.

To show that he had no such lien, *Mitford* cited Freemoult v. Dedire, 1 P. W. 429.

On the other side Partridge argued, that this being the only real estate which the testator had, on which he could give a security, this must be subject to the creditor's demand; and that the short interval between the date of the note and the death of the maker of it (who was absent in Wales the whole of that time) would account for his not being called upon to execute the security in form.

But the Lord Chief Baron said (and the court agreed) that this case could not be distinguished from Freemoult v. Dedire; that the creditor had taken a personal security, reserving to himself the power of calling for a real security, which however he had not done, and therefore it was impossible to say that this debt was a charge on any particular lands.

NEWSOM v. BEARD.

SUPREME COURT, TEXAS, 1876.

[45 Tex. 151.1]

APPEAL from Colorado. Tried below before the Hon. Livingston Lindsay.

In 1872 T. R. Beard shipped to market a lot of hogs for one J. G. Burke. Burke became indebted on account to Beard, and promised him that he would send another drove of hogs to market by Beard, and that he should have a lien on all his (Burke's) hogs for the debt.

Thereafter, in June, Burke, then owning sixty or seventy head of hogs in Colorado County, sent one J. B. Walker to Eagle Lake, with

¹ This case is abridged. — ED.

written authority to mortgage the hogs to any one who would advance \$125 gold. The loan was obtained from Beard, who at that time resided at Eagle Lake. Soon after the loan Beard moved to Harrisburg, in Harris County. Six weeks after Beard's removal to Harrisburg he found, on the cars for Galveston, in charge of one Dunn, a drove of Burke's hogs. Beard procured an attachment for the hogs, but by agreement with Dunn the hogs were taken to Galveston and sold, and the money deposited with Lee, McBride & Co. until the ownership should be determined. Before the shipment, the hogs had been sold to Newsom & Co., Burke telling them that Beard once had a lien on them, but that it had been discharged.

Suit was brought by Beard on his account for \$285 gold against Burke, and against Newsom & Co., vendees of the hogs.

Verdict was rendered for plaintiff, and judgment was rendered for the whole amount against all the defendants.

IRELAND, ASSOCIATE JUSTICE. The exceptions to the petition were overruled, as appears from a bill of exceptions contained in the record. The court erred in overruling the exceptions to plaintiff's petition.

Nor do we think there is sufficient proof contained in the record to show that Burke had given plaintiff a mortgage on any hogs. It is true that in a certain class of cases equity will raise a lien; as for instance, where a man is put into possession of real estate, with an agreement that he is to make certain improvements or perform certain labor in or about said property, for which the owner was to give him a mortgage to secure him for said labor. In such a case equity would say that the tenant had a lien, whether the mortgage was executed or not. But we do not think that this principle can be extended to chattels, the number, kind, and value of which were not shown at the time, and which were in a different county, and were never in the possession of the creditor. A mere letter authorizing the bearer to execute a mortgage on certain hogs under the circumstances named could not be construed as a mortgage. (Mood's Appeal, 6 W. & S. 284.) The verdict of the jury was not warranted by the testimony or the charge of the court. The judgment is reversed and the cause remanded.

Reversed and remanded.

BRITT v. HARRELL.

SUPREME COURT, NORTH CAROLINA, 1890.

[105 N. C. 10.]

This was a civil action, tried before Boykin, J., at Spring Term 1889, of the Superior Court of Hertford County.

The plaintiffs allege, in substance, that in February, 1888, Dunn & Kitchen were engaged, in the county of Hertford, in getting railroad ties for market, and while so engaged the plaintiffs made advances to them in money and supplies to a large amount; that on the 13th day of February, 1888, "said Dunn & Kitchen were indebted to said Britt & Lawrence in the sum of \$132.26, balance on said supplies," for which they executed their promissory note, in words and figures as follows:

\$132.26.

Winton, N. C., February 13, 1888.

"We promise to pay Lawrence & Britt, out of the proceeds of certain railroad ties we now have in Hertford County, amounting to about forty-two hundred, the sum of one hundred and thirty-two 26 dollars, with interest thereon from December 3d, 1887, to be paid as follows: First deducting eighteen hundred ties for O. H. Perry, from the first amount hauled, then we will pay Lawrence & Britt, out of the remainder, at the rate of ten cents a piece for all delivered to transportation until they are paid in full, and authorize the purchaser to retain said amount for them.

"Witness our hands, this the 13th day of February, 1888.

"Witness:
"R. W. WINBORNE."

DUNN & KITCHEN.

The said paper-writing was duly proved and registered in Hertford County on the 14th of February, 1888, and "thereafter Dunn & Kitchen did not cut and hew any more ties in said county, and said 4,200 ties were all that they had in said county at that time;" that "about the 1st of April, 1888, Dunn & Kitchen delivered 800 ties for transportation, and left the remainder in the woods where they were cut; that about June 1st, 1888, Dunn & Kitchen abandoned the State, or kept themselves concealed therein to avoid service of summons, and with intent to defraud their creditors; and thereupon L. J. Jordan and S. J. Holloman, upon whose lands the ties were cut, sued out an attachment against them, and, under proceedings therein, the remainder of said ties, about 3,400, were sold at public sale, and the defendant Harrell became the purchaser; the ties so purchased were those owned by Dunn & Kitchen, in Hertford County, at the time of the

execution by them of the said paper-writing, and embraced within its provisions; the defendants J. P. Harrell and A. C. Vann hauled to a point on the banks of the Chowan River, for transportation, 2,000 or more of the ties. No part of said note has ever been paid, and the plaintiffs allege that they have an equitable lien to have said ties subjected to the payment thereof. Dunn & Kitchen are totally insolvent, as is also Harrell, who is threatening to sell and remove said ties, and, if permitted to do so, the plaintiffs will sustain irreparable loss. Harrell purchased with full knowledge of the claim of plaintiffs, and they ask that he be restrained," &c.

A restraining order was issued, and the defendants filed thereafter the following demurrer:

"The defendants demur to the plaintiffs' complaint in this action, because it fails to state facts sufficient to constitute a cause of action, in that—

"1. It does not appear that the plaintiffs have any lien, equitable or

otherwise, upon the railroad ties described in the complaint.

17. It does not appear that the defendants, or either of them, are under any legal obligation whatever to the plaintiffs.

Judgment was rendered sustaining the demurrer, and the plaintiffs

appealed.

Davis, J., after stating the case: The sole question presented in this case is, Was the paper executed by Dunn & Kitchen a chattel mortgage? Was it sufficient to constitute a lien, legal or equitable, in favor of the plaintiffs against a purchaser at a sale made by the sheriff under execution?

Whether the instrument, in itself, is a mortgage, is a question of law to be determined by the Court. Comron v. Standland, 103 N. C. 207; Jones on Chattel Mortgages, § 18.

In the case before us there is nothing in the paper to indicate that Lawrence & Britt shall "have a lien" upon the railroad ties. Nothing found therein imports a conveyance of the title to the ties. No authority is given to sell the property upon default of payment, or in any way to dispose of or control it. There is nothing to bring it within the definition of a legal mortgage. Jones on Chattel Mortgages, § 1, et seq.

But it is insisted that it is an equitable assignment or appropriation of the ties to the payment of this debt, and the purchaser at the sheriff's sale had notice. We do not think it can be so considered. It was only a promise by Dunn & Kitchen to pay money, with the additional promise that they would pay it "out of the proceeds" of the ties.

While "no particular form is necessary to constitute a mortgage," yet the words must "clearly indicate the creation of a lien, specify the debt to secure which it is given, and upon the satisfaction of which the lien is to be discharged and the property upon which it is to take effect." "The statement that the creditor is to have a lien, and that

on default he may take possession and sell, . . . sufficiently discloses the intent." Harris v. Jones, 83 N. C. 317, and cases cited. The instrument under review gives the plaintiff, in no event, authority to take possession and sell the ties.

A debtor says to his creditor: "I will send cotton which I have in my gin to my commission merchant and pay your debt out of its proceeds, or I will authorize him to retain it for you." The debtor sends the cotton off and sells it, or it is seized under execution and sold by the sheriff. Would the creditor, in such a case, even though he had registered the *promises* of his debtor, have a right, in law or equity, to follow the property and have it applied to the payment of his debt? However it might be as between the parties, one making the promises and the other relying on them, in the absence of any charge or circumstances of fraud or collusion to cheat the debtor, as to third persons, such an agreement could, in no sense, be regarded or treated as a mortgage of the cotton.

The plaintiffs say: "This lien was not divested by the attachment in favor of Jordan and Holloman and the sale thereunder to the defendant," and for this, the case of Lake v. Doud, 10 Ohio, 415, is cited. The plaintiff's misfortune is that, in this case, there was no lien. In the case of Lake v. Doud, the mortgage had been drawn properly, and was registered, but it was improperly attested; was not therefore a "legal mortgage." The complaint charged that the defendants (whose relations to each other are set out) combined to cheat and defraud him, and the Court, after setting forth at great length facts to show the fraudulent character of the transaction, were "irresistibly led to the conclusion" that it was fraudulent and void, and held that though the plaintiff had no legal mortgage, yet he had an equitable mortgage, which could be enforced.

There is no allegation or pretence of any combination and collusion between the execution creditors, the purchasers at the sheriff's sale, and the debtors in the present case, to cheat and defraud the plaintiffs, and the case is unlike that of Lake v. Doud.

The plaintiffs had nothing in addition to their note but the *promises* of Dunn & Kitchen that they would pay "out of the proceeds of certain railroad ties," &c., and "authorize the purchaser to retain" the amount of their debts for them; and these promises, without a transfer of the title to the ties, as security, were worth no more, it seems, than the promise to pay the money.

Affirmed.

¹ To the same effect are Berrington v. Evans, 3 Y. & C. 384; Vanniman v. Gardner, 99 Ill. App. 345; Clement, Bane & Co. v. Swanson, 110 Iowa, 106; Finn v. Donahoe, 83 Mich. 165; Langley v. Vanghan, 10 Heisk. 553.—Ed.

ble are RICCARD v. PRICHARD.

RICCARD v. PRICHARD.

CHANCERY, 1855.

[1 Jurist N. S. 750.]

In January, 1852, the defendant Prichard was in prison on a ca. sa., at the suit of the plaintiff Riccard, for £531. Prichard was at that time prosecuting a demand for a considerable sum against a railway company to which he had been engineer, and which was being wound up. It being represented to the plaintiff that the imprisonment of Prichard was likely to prejudice his claim, it was arranged that the defendant should be released. The taking in execution having been a satisfaction of the debt, the defendant confessed a new judgment on his release for £548 debt and fresh costs, and Mr. Phillips, his solicitor, wrote a letter, dated the 12th January, 1852: "Prichard v. Riccard. Second action. In pursuance of the arrangement for liberating the defendant from prison, we undertake to pay the whole amount due at the time of such payment upon the judgment in the first action, or so much thereof as the moneys in our hands shall be able to satisfy, out of any moneys which may be received by us from the claims pending on behalf of Mr. Prichard, and which may remain in our hands after payment or satisfaction of any costs or lien which may be due to us, or which we may have thereon." The defendant afterwards approved this letter, and authorized Phillips to carry out the arrangement. The defendant got a sum of £3,538 awarded to him against the company on arbitration, on which he sued out judgment and execution, but got a return of nulla bona. He then attached a larger debt due to the railway company from certain canal companies, who thereupon paid the amount of the attachment into the Common Pleas. The defendant was now seeking to get this money into his own hands, having changed his solicitors. The original solicitor, Phillips, was the plaintiff in one suit. facts were not denied. The plaintiffs in both suits had obtained ex parte injunctions, and the defendant now in each case moved to dissolve them.

SIR W. P. WOOD, V. C. The injunction must be continued. agreement stated in the bill (and admitted by the defendant) contains just the clause which brings it within the rule laid down in Rodick v. Gandell (ubi sup.), viz., "that where there is an agreement between ' debtor and creditor that the debt owing shall be paid out of a particular fund coming to the debtor, that creates a valid equitable charge upon the fund, and operates as an equitable assignment of the fund pro tanto." The defendant does not deny the allegation in the bill as to the arrangement on his release from prison; he does not deny that Phillips was his solicitor; all that he ventures to sayis, that he cannot say whether all the representations and promises

which Phillips then made were with his, the defendant's, full knowledge and consent or not. The quibble by which the defendant says he undertook to pay the plaintiff out of these moneys when he should receive them, but that he never intended to receive them, but to apply them some other way, reminds one of the quibble unsuccessfully raised at common law on a promissory note, in which the maker of the note said, "I promise not to pay." I therefore refuse this application, with costs.

IN RE BELL. CHANCERY, 1895.

[1896, 1 Ch. 1 1]

A. L. SMITH, L. J. William Bell died leaving a will under which Dudley Wells became beneficially entitled to one eighth share of a legacy of £8,000 bequeathed to trustees. He assigned that share to Garland by way of security with a proviso for redemption, and that mortgage has been transferred to Mr. Jeffery. A subsequent encumbrance was created by Dudley Wells on this share, and he afterwards became bankrupt, and by a deed of arrangement under the Bankruptcy Act assigned the share to a trustee for the benefit of his creditors, subject to Jeffery's mortgage. Mr. Jeffery is entitled under his security to £380 and interest, and has taken out an originating summons asking that the trustees of the will may be ordered to pay over to him the whole of Dudley Wells's share, amounting to £1,000. The puisne encumbrancers were not before the court, but Mr. Jeffery, on his own showing, is not entitled to the £1,000, but only to a sum which I will call £400, and the question is whether he is entitled to demand to have the whole £1,000 paid over to him. It would be absurd for me to say that I am as familiar as my brother Rigby with the practice of the Court' of Chancery; but it certainly seems to me odd that because a man is entitled to receive out of a trust fund £400 he is therefore entitled to receive and administer the whole fund. Is this so? Mr. Marten admitted that if the fund was in court, the court would only pay out to Mr. Jeffery the £400, and would itself administer the remainder. that Mr. Jeffery has only a security for £400 on the £1,000, and why should the whole £1,000 be paid to him? No reason was given why it

¹ Only one opinion is printed. - ED.

should be. Kekewich, J., has gone further than ordering this payment; he has held that the trustees were so wrong in refusing to make the payment that they ought to be ordered to pay the costs of the proceeding to compel them to make it. The order must be reversed, and Mr. Jeffery must be ordered to pay the trustees' costs relating to this part of the case.

SPOONER v. SANDILANDS.

CHANCERY, 1842.

[1 Y. & C. C. C. 390.]

THE bill charged that the power of attorney was not revoked by the death of Richard Sandilands, and that the same was part of a security for a debt justly due to the plaintiffs. The bill further charged, that even if it were as a power of attorney revoked by the death of Richard Sandilands, yet that it operated not only as a power of attorney, but also as a contract and agreement in writing by Richard Sandilands with the plaintiffs and their late partners, that possession of the said freehold lands and premises should be retained by the plaintiffs and their late partners, and the rents and profits thereof be received by them, until they should be duly paid and satisfied the said sum of £241 7s. 9d., the aforesaid arrears of interest, and also all interest which should from time to time become due and owing for or in respect of the said sum of £1,789 18s. 4d., or any part thereof, so long as the said sum of £1,789 18s. 4d., or any part thereof, should remain due. The bill further charged that the nower of attorney was a valid equitable charge upon the said freehold lands and hereditaments, and constituted a good lien thereon, and entitled the plaintiffs to retain possession thereof.

THE VICE CHANCELLOR. I am of opinion that the instrument in question amounts to a contract to charge the freehold hereditaments in question; under which the plaintiffs became entitled to enter into possession, and retain the possession, and receive the rents, until thereby or otherwise they should be paid the £1,789 18s. 4d., and interest, and the interest then remaining due in respect of the £2,500. It is impossible to doubt that this was the intention of the parties, and I think that this intention has been carried into effect, and that, therefore, there must be the usual account as in a foreclosure suit, where the mortgagee is in possession, of the principal money and interest due to the mortgagee, and of the amount due to him for

costs, both here and at law; not directing, at present at least, either a sale or foreclosure. I will not grant any injunction, the defendant undertaking not to proceed at law. Further directions and costs must be reserved until after the Master shall have made his report.

BROWN v. BROWN.

SUPREME COURT, INDIANA, 1885.

[103 Ind. 23.]

ELLIOTT, J. The complaint of the appellee sets forth the following contract:

"January 29th, 1879. "Memoranda of contract between Solon H. Brown, of the first part, and Elijah C. Brown, of the second part. This is to certify that we, of the first part, did obtain of Elijah C. Brown, of the second part, three thousand dollars, part in a claim against John S. Gray of \$2,640; and the remainder in his own paper, with which we did purchase of the said John S. Gray and others, the following described tract of land in Montgomery county, Indiana, known as the 'Folse farm,' and described as follows: The west half of the west half of the southwest quarter of section thirty-five (35), in township nineteen (19) north, range six (6) east; and also the east half of the southeast quarter of section thirty-four (34), in township and range aforesaid, together containing one hundred and twenty acres. The use and control of which we do hereby turn over to the said Elijah C. Brown, of the second part, until sold, and when sold the \$3,000 above named and one-half of the advance over, together with the said \$3,000 that may be obtained on the sale of said land, we will pay to Elijah C. Brown, of the second part; and, also, we, of the first part, do herein agree to put on said lands two hundred dollars (\$200) worth of improvements in clearing, fencing and ditching (when deadening gets in suitable condition), and that we, Elijah C. Brown, of the second part, herein agreeing, shall pay the taxes on said lands and keep the farm in as good repair as when received. And in case that the said Elijah C. Brown, of the second part, shall decease before the sale of the farm and the cancelling of this paper, then the three thousand dollars named above shall be and is hereby a gift to the said Solon H. Brown, of the first part, and this paper shall become null and void.

"In testimony whereof we do hereunto subscribe our names respectively the day and year above named.

(Signed)

[&]quot;Solon H. Brown.

[&]quot;MARY J. Brown.

[&]quot;ELIJAH C. BROWN."

It is alleged that Solon H. Brown died testate, in January, 1883, leaving surviving him the appellants as his only heirs; that prior to his death the testator borrowed of the appellee the \$3,000 mentioned in the written contract, for the purpose of purchasing the land therein described. It is also alleged that, on the 29th day of January, 1879, Solon H. Brown, becoming dissatisfied with his purchase of the land, on account of his inability to pay the notes which he had executed to secure the \$3,000 borrowed of the appellee, executed the written contract. It is also averred that the appellee has performed his part of the contract, and that the testator and Mary J. Brown have failed to perform their part, in that they have not expended \$200 in improvements; that the real estate has not been sold. Prayer that the plaintiff be decreed to have an equitable interest in the land; that it be ordered sold, and that the appellee's claim be paid out of the proceeds of the sale.

The case is a peculiar one, but we think the facts stated entitle the appellee to relief. The instrument is badly drawn and was evidently prepared by an unskilful person, but it is not meaningless.

A cardinal rule in the construction of contracts is, that they shall be given effect if possible, and the intention of the parties carried into execution. In order to give this contract effect, it must be held that it evidences a debt due to the appellee, payable out of the proceeds of a sale of the land, and to effectuate the intention of the parties, it must be held that a sale of the land shall be made and the debt paid. terms of the contract, and the circumstances under which it was executed, show that the appellee meant to hold the signers of the instrument liable for the money, and that they assented to this, and also agreed that the money borrowed should be paid out of the proceeds of a sale of the land. It further appears that the money was obtained for the purpose of purchasing the land, and that it was used for that purpose; it is, therefore, equitable that the money which bought and paid for the land should be repaid to the person who furnished it, and this, it is evident, was the intention of the parties. Counsel for the appellant say: "But it was earnestly insisted by counsel for appellee in the court below that the stipulation in the contract, viz., 'The use and control of which' (the land) 'we do hereby turn over to the said Elijah C. Brown of the second part, until sold, and when sold the \$3,000 above named, and one-half of the advance over, together with the \$3,000 that may be obtained on the sale of said land, we will pay to Elijah C. Brown, of the second part,' evinced a clear and unmistakable understanding that the land was to be sold. Standing alone this conclusion would seem reasonable. But, in construing a contract, reference must be had to the entire instrument. The intention of the parties to the contract is the thing to be ascertained. This can not be done by reference to a particular sentence or clause; all the parts must be considered together. Tested by this rule, we think the conclusion erroneous." The argument of appellant's counsel does not meet the

proposition of the appellee, for the clame writing was sufficient for that consistent with all the other stipulations

tion claimed by the appellee makes the 31, 1890, and was in renewal of tive one; while any other constructioner 1, 1884. Neither of these notes frustrate the intention of the parties. 6, 1883, and there is no writing

It is true that no time is fixed for thear that the parties intended the dollars, but this, surely, does not relieves. We are of opinion that the If a man promises to pay money borrothe lien.

a time for payment does not invalidately the \$5,000 note was in force on plies the omitted element, and prescribs intestate died. Administration within a reasonable time. So, here, thd 9, 1897. Thereafter the assignand made it the obligation of the debtrs of the exchange and to the dereasonable time.

| The plaintiff was entitled under it | the plaintiff was entitled under it |

The instrument is not a lease; it he The seat was sold with notice of except that of possession, and that is id over by the exchange to the The instrument is a mortgage, for iotice. This change of the proppromise to pay it out of the land, and rights existing when the lien was of the creditor until payment of the demortgaged land into money by a perhaps not a complete one, but it is sed and held the proceeds of the right to have the land, pledged to him v. Caldwell, 141 Mass. 489, 492, to pay the debt; in short, it is at mortgage of the lien and here.

Mortg., section 162. new with notice of the lien and has What we have said disposes of at to extinguish the debt for which renders it unnecessary to discuss the ntitled to a decree unless the lien

iff's right to its enforcement lost loney was paid to the defendant.

¹ To same effect is Racoullat v. 1

Re Wittenberg, V. & P. Co., 108 Fed. 593,

It is alleged that Solon H. ise quoted from the contract is leaving surviving him the appea, and giving to it the construction death the testator borrowe contract a complete and effection the written contract, for the would practically nullify it and described. It is also alleged the

Solon H. Brown, becoming dist payment of the three thousand on account of his inability to re the debtor from his obligation. secure the \$3,000 borrowed of ved of another, the failure to fix tract. It is also averred that the the contract, for the law supthe contract, and that the testates that payment shall be made perform their part, in that they law entered into the agreement ments; that the real estate has or to pay the creditor within a tiff be decreed to have an equit

ordered sold, and that the appells none of the features of a lease of the sale.

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The case is a peculiar one, but evidences a debt, contains a appellee to relief. The instrum puts the land in the possession prepared by an unskilful person, 3bt. It is not the usual mortgage,

A cardinal rule in the construcsufficient to vest in the creditor a given effect if possible, and the and put into his possession, sold execution. In order to give this a equitable mortgage. 1 Jones evidences a debt due to the appersale of the land, and to effectuatil the questions in the case, and be held that a sale of the land she rulings on the answers.

Tudgment affirmed.

cuted, show that the appellee me ment liable for the money, and Lausevain, 32 Cal. 376. — ED.

agreed that the money borrowed: a sale of the land. It further app the purpose of purchasing the land pose; it is, therefore, equitable th for the land should be repaid to t it is evident, was the intention of lant say: "But it was earnestly i court below that the stipulation control of which' (the land) we d C. Brown of the second part, ur. above named, and one-half of tl \$3,000 that may be obtained on 1 Elijah C. Brown, of the second par understanding that the land was to clusion would seem reasonable. ence must be had to the entire parties to the contract is the thing done by reference to a particular se be considered together. Tested by erroneous." The argument of app payment of this \$5,000 note, and the writing was sufficient for that

purpose.

The note of \$2,000 was dated May 31, 1890, and was in renewal of part of a note of \$2,300 dated December 1, 1884. Neither of these notes mentioned the assignment of October 6, 1883, and there is no writing signed by Weeks which makes it clear that the parties intended the lien to apply to either of these notes. We are of opinion that the \$2,000 never has been secured by the lien.

This lien for the debt represented by the \$5,000 note was in force on August 8, 1897, when the defendant's intestate died. Administration upon his estate was granted August 19, 1897. Thereafter the assignment was presented both to the officers of the exchange and to the defendant, and the claim was made that the plaintiff was entitled under it to be secured for its indebtedness. The seat was sold with notice of this claim and a large sum was paid over by the exchange to the defendant, who took it with like notice. This change of the property into money, in accordance with rights existing when the lien was created, was like the conversion of mortgaged land into money by a foreclosure sale and the lien subsisted and held the proceeds of the sale. Western Union Telegraph Co. v. Caldwell, 141 Mass. 489, 492, 493.

As the defendant received the money with notice of the lien and has of it in his hands more than enough to extinguish the debt for which the lien is security, the plaintiff is entitled to a decree unless the lien has been extinguished or the plaintiff's right to its enforcement lost since November 7, 1897, when the money was paid to the defendant.

¹ Ex parte Pooley, ² M. D. & DeG. 505; Re Wittenberg, V. & P. Co., 108 Fed. 593, are similar cases in principle. — Ed.

CHAPTER II.

THE SUBSTANCE OF THE MORTGAGE.

SECTION I. GRANT OF TITLE.

A. Absolute Deed.

ENGLAND v. CODRINGTON.

CHANCERY, 1758.

[1 Eden, 169.]

This was a bill brought by the plaintiffs (all of the name and family of England, who were entitled to certain premises at Marshfield in the county of Gloucester, under various family transactions) against Sir William Codrington, for an account of the rents and profits, and a redemption, &c.

THE LORD KEEPER. I am of opinion, upon the proofs in this cause, and particularly from the answer of Sir William Codrington, that the agreement, bearing date the 18th of July, 1751, was not for the sale of the premises therein mentioned, but was only an agreement to convey the estates to Sir William and his heirs, redeemable at a certain time, and particular event, upon payment of the money with interest, which ought to have been inserted in the agreement; and appears to me to have been fraudulently omitted by the drawer of it.

I am therefore of opinion that the conveyances are not to be considered in this court as absolute conveyances, but as securities for the money advanced by Sir William Codrington, together with interest, according to the rate of interest which the several mortgages paid off by him bore; and the defendant having insisted on the same as absolute conveyances, contrary to the real truth of the transaction, and thereby occasioned this suit; let the Master tax the plaintiffs their costs to this time, &c.

Usual decree for an account; &c.

of h

FRAZIER v. FRAZIER ET AL:

SUPREME COURT, NORTH CAROLINA, 1901.

[129 N. C. 30.]

BILL FOR REDEMPTION.

CLARK, J. To convert a deed absolute on its face into a mortgage it must appear that the clause of redemption was omitted through ignorance, mistake, fraud, or undue influence. There is no evidence of this. On the contrary, the plaintiff's testimony is that he declined to execute a mortgage. To cause a deed to be decreed in trust, there must be strong evidence of such agreement, and proof of such intention must be made, not by simple admission of the parties thereafter, but there must be proof of facts and circumstances dehors the deed inconsistent with the idea of absolute purchase; otherwise, the solemuity of deeds would always be subject to "the slippery / memory of witnesses." Kelly v. Bryan, 41 N. C. 283: Porter v. White, 128 N. C. 42; 38 S. E. 24. If the transaction is a sale with power to repurchase, there is no equity to interfere. Adams, Eq. 111, and cases there cited. Here such circumstances are wholly lacking. On the contrary, the grantee went into possession at the end of the year, it being already rented out, and put up buildings, and cleared one-half of the land for cultivation, and he and his devisees have been in undisturbed possession since 1883. There is an allegation that the grantee made a contemporaneous parol agreement to reconvey upon repayment of the purchase money, but there is no evidence of such repayment. The plaintiff relies upon an allegation that the rents and profits should be applied to repayment of the purchase money, but there is no proof whatever of such agreement. In sustaining a demurrer to the evidence, there was no error.1

¹ In a few jurisdictions the view is held that fraud, mistake, undue influence or the like must be shown in order to get relief from equity in such cases. See French v. Burns, 35 Conn. 359; McClain v. White, 5 Minn. 178; Norris v. McClain, 104 N. C. 159: Carter v. Walker, 1 Murphey, 488. — Ed.

STRONG v. STEWART.

COURT OF CHANCERY, NEW YORK, 1819.

[4 Johns. Ch. 167.]

BILL to redeem mortgaged premises. The defendant set up an absolute sale, by an assignment, absolute in terms, of the right of Mitchell in the land, and denied the fact of a loan. But the defendant, at the same time, admitted in his answer, that after the assignment was executed he gave Mitchell, at his request, time to return the money, and take back the assignment.

Parol proof was taken, which established, conclusively, the fact of a loan, and not a purchase and sale; and that the assignment was

made, given and received, by way of security for a loan.

THE CHANCELLOR. On the strength of the authorities, and on the proof of the loan, and of the fraud, on the part of the defendant, in attempting to convert a mortgage into an absolute sale, I shall decree an existing right in the plaintiffs to redeem. The cases of Cotterell v. Purchase, Cases temp. Talbot, 61; Maxwell v. Mountacute, Prec. in Chancery, 526; Washburn v. Merrills, 1 Day's Cases in Error, 139; and the acknowledged doctrine in 2 Atk. 99, 258; 3 Atk. 389; and 1 Powell on Mortg. 104 (4th London edit.), are sufficient to show, that parol evidence is admissible in such cases, to prove that a mortgage was intended, and not an absolute sale, and that the party had fraudulently perverted the loan into a sale. In this case, the admissions in the answer were sufficient to presume a mortgage, against the absolute terms of the assignment.

1 Decree accordingly.

OBERDORFER ET UX. v. WHITE.

COURT OF APPEALS, KENTUCKY, 1904.

[78 S. W. 436.]

Action by Nina Iola Paine White against Lewis Oberdorfer and wife. From a judgment for complainant, defendants appeal. Affirmed.

Hobson, J. On May 15, 1900, Nina Iola Paine (now White) signed, acknowledged, and delivered to Lewis Oberdorfer a deed by which, "in consideration of one dollar and other good and valuable consideration," she conveyed to him, in fee simple, her one-third interest in a

tract of land in Jefferson county worth about \$9,000, in which her father, then fifty-five years old, held a life estate. On July 26, 1901, she filed this action, alleging that the deed was only intended as a mortgage, and seeking to have it so adjudged. Oberdorfer and his wife, Sophia, were made defendants to the action; he having on May 22, 1900, conveyed the land voluntarily to her. On final hearing the court set aside the deed from Oberdorfer to his wife as fraudulent, and adjudged the deed executed by Miss Paine to be good only as a mortgage for \$407.39. From this judgment, Oberdorfer and wife appeal.

The evidence fully sustains the learned chancellor. It leaves no question that the grantor understood she was only making a mortgage on the property. While there is some conflict in the evidence as to the amount paid by Oberdorfer, when we consider the circumstances, we have no doubt that the amount fixed by the chancellor is correct. deed absolute on its face may be shown to have been executed as a mortgage. The rule on this subject is thus well stated in 3 Pomerov's Equity, § 1196: "Any conveyance of land absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of purchase, or other agreement, may, in equity, by means of extrinsic and parol evidence, be shown to be a mortgage, as between the original parties, and as against all those deriving title from or under the grantee, who are not bona fide purchasers for value and without The principle which underlies this doctrine is the fruitful source of many other equitable rules that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title, which had been intentionally given to him, and which he had knowingly accepted, merely as a security, and therefore in reality a mortgage. The general doctrine is fully established, and certainly prevails in a great majority of the States, that the grantor and his representatives are always allowed, in equity, to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance cannot be a mortgage. If there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be - an absolute conveyance of the land. To overcome this presumption, and to establish its character as a mortgage, the cases agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with

all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees." Under this rule, the proof in the record is sufficient to sustain the chancellor's judgment. Appellant did not ask the enforcement of the mortgage. This he can have in a separate suit if his debt is not paid. Judgment affirmed.

SALT v. MARQUESS OF NORTHAMPTON.

House of Lords, 1892.

[1892. A. C. $1.^2$]

APPEAL from a decision of the Court of Appeal reported as Marquess of Northampton v. Pollock.

The appeal arose in an action brought by the Marquess of Northampton as administrator of the late Earl Compton against Henry Pollock, J. C. Salt, and Sir H. W. Tyler, who were Trustees of the National Life Assurance Society.

By a bond and disposition in security in Scotch form dated the 26th of May, 1879, the late Earl Compton, being the heir of entail next entitled after the death of his father (the plaintiff) to certain real estates in Scotland, in consideration of the sum of £10,000 advanced to him by the defendants, bound himself, his heirs, executors, and representatives to pay the defendants that sum at Martinmas, 1879, (with a fifth part more of liquidate penalty in case of failure) and interest on the said sum at $5\frac{1}{2}$ per cent per annum, and thereafter half yearly during the non-payment of the principal sum to pay interest at the rate aforesaid with the like liquidate penalty. He also bound himself, so long as the principal sum or any part thereof should remain unpaid, to pay the defendants the annual sum of £435 5s., being the premium of a policy of assurance effected by the defendants on his life as against that of his father in the National Life Assurance Society for £34,500; also that if he should at any time not pay one or more of the

¹ By the overwhelming weight of authority an absolute conveyance given for security may be shown by parol in equity to be a mortgage in substance. See Cripps v. Gee, 4 Bro. C. C. 472; Re Duke of Marlborough, 1894, 2 Ch. 133; Peugh v. Davis, 99 U. S. 332; Edwards v. Rogers, 81 Ala. 568; Bogenschultz v. O'Toole, 70 Ark. 253; Anthony v. Anthony, 23 Ark. 479; Taylor v. McLain, 67 Cal. 513; Adams v. Adams, 51 Conn. 544; Bank v. Ashmead, 23 Fla. 379; Fleming v. Georgia R. R. Bk., 120 Ga. 1023; Brown v. Follette, 155 Ind. 316; Ruckman v. Alwood, 71 Ill. 155; McDonald v. Kellogg, 30 Kans. 170; Knapp v. Barley, 79 Me. 195; Campbell v. Dearborne, 109 Mass. 131; McMillan v. Bissell, 63 Mich. 66; Marshall v. Thompson, 39 Minn. 137; Klein v. McNamara, 54 Miss. 90; Eisemann v. Gallagher, 24 Neb. 79; Frink v. Adams, 36 N. J. Eq. 485; Mooney v. Bryne, 163 N. Y. 86; Green v. Sherrod, 105 N. C. 197; Kempen v. Campbell, 44 Ohio St. 210; Wollenberg v. Minard, 37 Oreg. 621; Pearson v. Sharp, 115 Pa. 254; Carter v. Evans, 17 S. C. 458; Lovering v. Milliken, 59 Tex. 423; Edwards v. Ware, 79 Va. 321; Hursey v. Hursey, 56 W. Va. 148. — Ed. 2 This case is abridged. — Ed.

premiums it should be in the power of the defendants to pay such premiums themselves and to charge the amount so paid against him in like manner as the principal sum. And in security of the personal obligation therein written he assigned his reversionary interest in the aforesaid real estates to the defendants in the manner therein mentioned reserving power of redemption.

Earl Compton died in 1887 without ever paying anything.

The statement of claim referred to the above-mentioned documents and claimed (inter alia) a declaration that the defendants were entitled to the policy and the sums assured thereby as a security only for the £10,000 with interest and for the premiums with interest, and also claimed an account and inquiry and payment of the balance after deducting what should be found due.

Earl of Selborne. My Lords, my opinion in this case has undergone some fluctuation, owing perhaps to the manner in which it was presented to your Lordships. Usually, in questions of this kind, there is some evidence of facts, in addition to what may be collected from the instruments executed to give effect to the contract between the parties. Here, your Lordships have nothing beyond those instruments themselves, and the pleading of the appellants in their "defence," which is to be taken as admitted, subject to such explanation or correction as it may receive from the documents.

The facts, that the policy of insurance was for more than three times the amount of the debt, and that no premiums were ever paid by the debtor (an event which was contemplated and provided for as probable), seemed to me for some time to have an aspect favorable to the appellants. They would, certainly, have been as consistent with an intention that the policy should be effected for the creditor's protection only, and for his sole benefit, subject to an option for the debtor to make it his own, in the event (not anticipated) of his paying off the debt in his lifetime, as with an intention that it should belong to the debtor, subject to the security for the purpose of which it was effected. The question is, which of these contracts is to be inferred from the terms of the instruments creating the security? In favor of the former, there is nothing else, except the statement in the "defence," and the stipulation itself, of which the validity or invalidity in point of law is now to be determined.

It was considered by all the judges in the court below, and it was admitted (I think rightly) at your Lordships' bar, that the case must be decided in the same way as if the policy had been effected in any other office, and not (as it was) in the office of the creditors. The creditors might, and probably they did, reinsure in some other offices or office. And I think it is also immaterial for the purpose of the present question, that the debtor did not pay the premiums, or any of them, and that the probability of his failing to do so was provided for by the contract. He bound himself to do so; he was, as between himself and the appellants, chargeable with those premiums, which must,

for the present purpose, be treated as advanced to him by way of loan, just as much as the principal sum of £10,000. If, as things stand, the appellants are not mortgagees of the policy, and are not bound (the whole debt, interest, and premiums being satisfied out of its proceeds) to account for the surplus to the respondent, as the debtor's personal representative, their situation would have been the same if every single premium had been paid by the debtor in his lifetime.

If the policy, which was certainly effected for the purpose of being made (in some sense) a security to the appellants, belonged (subject to that security) to the debtor, and if the appellants ought to be regarded as mortgagees of that policy, it is admitted that a stipulation, that, in the event of the debtor dying without having paid off the debt, the policy should not be redeemable, would be void; and, upon the same supposition, it is not less clear that this is the character of the stipulation now in question. The only question is, whether the debtor was, in fact and in law, mortgagor of, and entitled to redeem this policy. This he could not be, unless he had an interest in it which he could and did make a security to the appellants,

If the question is to be determined by what appears upon the face of the bond and disposition in security of the 26th of May, the minute of agreement of the 26th and 28th of May, and the supplementary agreement of the 14th of June, 1879, taken all together, and read in the light of the appellants' acknowledgment at your Lordships' bar, that the supplementary agreement was not intended to make Lord Compton's representatives liable to be sued for the whole debt while the whole proceeds of the policy were retained by the appellants, I cannot escape from the conclusion that the parties did stand to each other, in respect of this policy, in the relation of mortgagor and mortgagee.

I am unable to dissent from the view taken by North, J., and by the majority of the judges in the Court of Appeal; and I propose to move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.

LOGUE'S APPEAL.

SUPREME COURT, PENNSYLVANIA, 1883.

[104 Pa. St. 136.]

This was an appeal by John Logue, Sr., from a decree declaring a certain sheriff's deed to him, absolute on its face, to be a mortgage, and enjoining him from conveying or encumbering the premises, &c.

Mr. Justice Sterrett delivered the opinion of the court.

The question then is, whether upon the facts thus established the appellee was entitled to a decree declaring the sheriff's deeds to be in fact mortgages, and ordering appellant, upon payment of the money secured thereby, to convey the legal title to the land therein described to the appellee. In some of its features the transaction differs from the familiar case of an absolute conveyance of land by the holder of the legal title, as security merely, and so intended by the parties thereto; but, in principle it is the same. Equity regards the substance rather than the form of a transaction. By his purchase at the sheriff's sales, appellee acquired an inceptive title to the land in question, which by payment of purchase money and delivery of deeds would have ripened into a complete legal title. He had such an interest as would have been bound by the lien of a judgment entered between the date of sale and the acknowledgment and delivery of the sheriff's deeds. But, instead of taking the deeds in his own name and then mortgaging the land to secure the loan made by appellant, it was suggested by the latter that the deed should be made directly to him, as security for the loan. This was agreed to and the arrangement was carried out. The manifest purpose of this was not to yest title absolutely in appellant, but to enable appellee to raise money to pay his bid, by pledging the land as security for its repayment. Appellant's subsequent repudiation of the agreement, under which the deeds were made to him directly, and his attempt to use the deeds for a purpose that was never intended when he obtained them, is a palpable fraud, against which equity, under the facts and circumstances found by the Master, will undoubtedly afford relief.

The decree of the court below declaring that the sheriff's deeds be taken and held to be mortgages, given to appellant, to secure the payment of the \$6,110 loan, made by him to appellee in August 23, 1879, and enjoining appellant from conveying or encumbering the premises, &c., is correct as far as it goes, but it does not go quite far enough. It should also provide that upon repayment of the loan, or so much thereof as remains unpaid, within a reasonable time,

appellant shall convey the land in fee to appellee, by deed, with covenant of special warranty against all acts done or suffered by himself. This decree may be enforced by attachment, or a Master may be appointed by the court for the purpose of making the conveyance. It appears that since the decree was entered the case has been sent to a Master for the purpose of stating an account between the parties and ascertaining the balance due by appellee to appellant. The sum to be paid by appellee to entitle him to a conveyance of the land will thus be ascertained and the decree can then be carried into effect by the court below.

CULLEN v. CAREY.

SUPREME COURT, MASSACHUSETTS, 1888.

[146 Mass. 50.]

BILL IN EQUITY to compel the reconveyance of land on the ground that the transaction by which the defendant's testator gained title was in substance a mortgage. Writ dated December 24, 1885.

In the Superior Court the case was referred to a master, who found the following facts:

In 1869 the plaintiff bought the land in question, subject to a mortgage, and proceeded to erect a tenement house. Leonard Carey, the husband of the defendant, who was a carpenter and indebted to the plaintiff for money lent, built the house for the plaintiff, supplying nearly all the materials and labor under an oral agreement whereby his indebtedness to the plaintiff was to be applied in payment of the

cost of construction. When the house was completed, the balance due Carey, after paying his debt to the plaintiff, was \$1,106, and the value of the house and land above the existing mortgage was \$3,300. The plaintiff moved into the house and occupied it about six months.

On or about June 1, 1870, the plaintiff and Carey made an oral agreement that Carey should gain title to the premises by levy on execution, and by a sale under the power in the mortgage, and hold them as security for the plaintiff's debt to him, and, after payment of the debt and expenses out of the rents, should reconvey to the plaintiff. In pursuance of this agreement, the plaintiff, on June 1st, 1870, gave to Carey a note for \$4,000, upon which an action was brought and judgment obtained by default against the plaintiff as agreed. An execution was issued and levied by a sale to Carey of the plaintiff's equity of redemption in the premises for \$4,317.39, and a conveyance in due form was made to him on May 29, 1871. On July 6, 1871, Carey, by the payment of \$583.17, procured the assignment of the mortgage to a third person, who proceeded in due form to sell the premises under the power therein to Carey for \$950, and a deed was given to him and duly recorded.

Morton, C. J. It was held in Campbell v. Dearborn, 109 Mass. 130, that, although a deed be given which is absolute in form, yet the grantor may prove by parol testimony that it was understood and agreed by both parties to be given as security for a debt; and that upon such proof a court of equity will treat the deed as a mortgage. This is decisive of the case at har.

For some reason, which does not appear to be fraudulent, the plaintiff did not directly convey the estate in question to the defendant's testator; he permitted the latter to obtain a judgment upon a debt in part fictitious, and thus to get a title by a levy upon the execution, and also to foreclose by a sale under an existing mortgage. But the substance of the transaction was the same as if a deed had been directly given by the plaintiff. Both parties agreed that the title thus obtained was to be held solely as security for the debt of the plaintiff to the defendant's testator, and a court of equity will treat the transaction according to its real nature as a mortgage.

The defendant does not stand in the position of an innocent purchaser, as she contends. She took as a general devisee under the will of her husband, and besides is shown to have had notice of the nature of the transaction.

Decree affirmed.

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COMSTOCK v. STEWART.

CHANCERY, MICHIGAN, 1843.

[Walker Ch. 110.]

BILL TO REDEEM.

THE CHANCELLOR. Is the deed from Comstock to Howard a mortgage to Howard in trust for Stewart? If it is a mortgage, and not a common deed of trust by a debtor for the benefit of a creditor, Comstock has a right to redeem, on paying Stewart what is due on the judgment.

Chancellor Kent defines a mortgage to be the conveyance of an estate, by way of pledge for the security of a debt, and to become void on the payment of it. 4 Kent Com. 135. The deed, on its face, purports to be given as security for the payment of the judgment, and Howard is not authorized to sell generally, but only on the happening of a contingency, viz., the non-payment of the judgment within six months. The fact that the debt is due to Stewart, instead of Howard, does not make it any the less a mortgage. It is not unusual for mortgages to be given to one person in trust for another. 1 Madd. Ch. 514; 4 Kent Com. 146; Clay v. Sharp, 18 Ves. R. 346, note. To have barred the complainant's equity of redemption, Howard should have foreclosed the mortgage, either at law, by advertising and selling under the statute, or in this court by bill.

It appears that a part of the judgment has been collected on one or more executions. There must, therefore, be a reference to a Master to ascertain the amount still due on the judgment, and all further questions are reserved until the coming in of the report.

ELLIS v. BROWN.

SUPREME COURT, MICHIGAN, 1874.

[29 Mich. 259.]

Case made from Kent Circuit.

This was a summary proceeding for the possession of land. case was brought before a circuit court commissioner and taken by appeal to the Circuit Court. The circuit judge tried it without a jury. and filed a special finding, giving judgment for the complainants. respondent had deeded the property to the complainants Ellis and Field, and at the same time the parties to the deed entered into a peculiar written agreement, whereby Brown was to be permitted to remain in possession of a portion of the property deeded, for a specified term, in consideration of the assistance he was expected to render in effecting sales of the property. This agreement contained stipulations for giving Brown a percentage upon any sales he made, and all over a given price in case he made a certain specified sale, and also certain benefits in case Ellis and Field made a specified sale. Brown brought about no sale: but Ellis and Field sold a portion to complainant Merchant. Brown refused to give up possession, claiming that the deed and contract amounted in law to a mortgage; and this is the only question of law involved. The circuit judge found against the respondent on this question, and he brought the case to this court.

THE COURT held that the decision of the circuit judge, that the contract, construed in connection with the deed, did not amount in legal effect to a mortgage, and that the contract was no defence to the proceeding for possession after the expiration of the term therein provided for, was clearly correct.

Judgment affirmed, with costs.

CARSTAIRS AND OTHERS, ASSIGNEES OF KENSINGTON AND CO., BANKRUPTS, v. BATES.

NISI PRIUS, 1812.

[3 Campbell, 301.]

This was an action against the defendant, as acceptor of a bill of exchange for £230, dated 13th July, 1812, drawn by J. Allport, payable to his own order, at two months after date, and indorsed by him to the bankrupts.

Allport the drawer kept cash with Kensington and Co. the bankers. On the 17th of July they discounted for him this bill and two others,—one for £50 and another for £80. They credited him with the amount of the three bills, and debited him with the discount; so that, deducting the discount, they were placed to his account as cash, which he might immediately have drawn out. There was then a balance due to him of three or four hundred pounds, and his account remained good till the banking-house stopped payment. This happened on the 21st of July, and the commission of bankrupt was sued out the following day.

LORD ELLENBOROUGH. Is it meant seriously to contest the right of the assignees to recover in this action? The bankers were the purchasers of this bill. They did not receive it as the agents of Allport. The whole property and interest in the bill vested in themselves, and they stood all risks from the moment of the discount. If the bill had been afterwards stolen or burnt, theirs would have been the loss. In Giles v. Perkins the bankers were mere depositaries, with a lien when the account was overdrawn. The customer there drew upon the credit of the bills deposited. Here Allport might have drawn out the amount of the bill, deducting the discount, as actual cash, in the same manner as if he had discounted the bill with a third person, and then paid in the amount in bank-notes. The discount makes the bankers complete purchasers of the bill; the transaction was completed; they had no lien, but the thing itself; the bill was as much theirs as any chattel they possessed. This very distinction was taken in the case cited; for it was there said, "If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his advance."

Verdict for the plaintiff.

GILES v. PERKINS.

King's Bench, 1807.

[9 East, 12.]

Dickenson and Co. were bankers at Birmingham, with whom the plaintiffs had opened a banking account in 1804, which was continued down to the 18th of November, 1805, when Dickenson and Co. stopped payment and became bankrupts. On the 12th of November, 1805, the plaintiffs paid into the bank three bills to the amount of above £1,100, which were indorsed by them, but were not due till December and January following; and at the time of the bankruptcy there was a considerable balance due to the plaintiffs upon their cash and bills (due) account, independent of the three bills in question. It was stated to be the practice of this and other banking houses in the country, that when bills which were approved were brought to them by a customer, though the bills were not then due, if they had not a long time to run, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer; giving him either cash or liberty to draw upon them to that amount.

And the question was, whether they were entitled to receive back these bills in specie from the bankrupts at the time of their bankruptcy, the same not being then due, though indorsed by them, and the balance of the cash account being in favor of the plaintiffs; or whether they were only entitled to come in as creditors under the commission for the whole amount of their banking account. Lord Ellenborough, C. J., was of opinion, at the trial before him at Guildhall, that the plaintiffs were entitled to recover; and they accordingly obtained a verdict for the amount of the bills.

LORD ELLENBOROUGH, C. J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it protanto for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker, who always takes the bill indorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favor of the plaintiffs.

PER CURIAM,

Rule refused.

WILLIAMS, EXECUTRIX, &c. v. SMITH AND OTHERS. SUPREME COURT OF NEW YORK, 1842.

[2 Hill, 301.]

Assumpsit, tried at the Albany Circuit in April, 1841, before Cush-MAN. C. Judge. The action was against the defendants as makers and indorsers of a promissory note of \$4,000, made by Smith, Green & Co., payable to the order of Daniel K. Green, and indorsed by the latter and A. Preston. The note was created for the purpose of taking up another note, of the same amount, running at the Oneida Bank. Both notes were against the same parties, except Preston, whose name was not upon the elder note: and who indorsed the note sued upon for the accommodation of the other parties, with the understanding that if it was not used to take up the other note, it should be destroyed. was delivered to Norton, one of the makers, to hand to the Oneida Bank, but he let one Keeler have it to raise money upon; and Keeler assigned it, with various other choses in action and possession, to the plaintiff's testator, as security to him against indorsements to be by him made for Keeler, not exceeding \$10,000. The indorsements were made; and there had been obtained out of the other property assigned to the testator, an indemnity for all his liabilities, except about \$2.400. It not appearing that the testator had notice of the purpose for which the note was intended, the circuit judge allowed the plaintiff to recover against all the defendants, Preston included, for the whole amount of A new trial was now moved for on a bill of exceptions.

PER CURIAM. The case is within the principle which applies to an advance upon a purchase; and the testator having had no notice, Preston, though a mere accommodation indorser, could not defend on the ground of the misapplication of the note.

But inasmuch as the testator took the note as collateral security, the plaintiff could recover no more than the \$2,400, the amount remaining due on the principal demand; and on this ground there must be a new trial.

New trial granted.

B. Conditional Sale.

MANLOVE v. BALE AND BRUTON.

CHANCERY, 1688.

[2 Vern. 84.]

ONE Bruton having a church lease for three lives in 1664, conveyed and assigned it to the defendant Bale's father, in consideration of £550 the conveyance was absolute. But Mr. Bale the purchaser by writing under his hand and seal agreed, that if Mr. Bruton the vendor should, at the end of one year then next ensuing, pay him £600, that he would reconvey: the £600 was not paid, and two of the lives died, and the lease was twice renewed by the defendant Bale and his father; and now it was near twenty years after the first conveyance Bruton being a prisoner in the Fleet, and indebted to the Warden for chamberrent, assigns to him all his right, title, interest, equity and power of redemption; and thercupon the plaintiff Manlove, the Warden of the Fleet, brought his bill to redeem and to have an account of the rents and profits of the premises.

The defendant insisted on his title, and that the estate was not now redeemable, nor ought he to account for the profits.

But notwithstanding the Master of the Rolls decreed a redemption on payment of the £550 which was the first consideration-money, as also the fines paid upon the renewal of the leases, which moneys were to be paid with interest, and the account of profits was to commence but from the death of Peter Bale, who was the purchaser, and father of the defendant, and until that time the profits were to be set against the interest of the £550 consideration-money.

MILLER v. THOMAS.

SUPREME COURT, ILLINOIS, 1853.

[14 *Ill.* 428.]

CATON, J. After a careful consideration of the evidence in this case, we are inclined to concur with the court below, that this transaction

should be treated as a mortgage. Edwards was indebted to Brown upon a note executed by himself and Dawson, in the sum of \$195, which he was not prepared to pay; and it is evident that a negotiation was had between the parties for further time, which had resulted in an agreement upon terms, except as to the nature of security. Upon this subject. Shephard was consulted, who suggested, that if he took a mortgage it would take as long to collect it as it would to sue the note. He then said he would buy the land, but in such a way that he could sell it at a certain day, for he would not have his money out of his hands, beyond his control. The result was a conveyance of the land from Edwards, and an agreement for a resale or conveyance, upon the payment of the amount due upon a certain day. There is much evidence given of the declarations of the parties, as to their intentions. made not only at the time of the transaction, but subsequently, which it is unnecessary to recapitulate minutely. As is generally observed in such cases, the strength of the declarations testified to vary very much, according to the inclination of witnesses, and the form of the questions put to them, eliciting the answers. Upon the whole, it is manifest, that it was the intention of both parties to provide the strongest security possible for the payment of the money designed to be secured, at the day stipulated; but, after all, it was only as security that the conveyance was made. While, on the one hand, Edwards stated, if he did not pay the money at the time agreed upon, he must lose his land; on the other, Brown stated, that he held the land as security for the payment of the money. The original note was probably given up at the time the deed was made, but the amount to be paid was specified in the agreement to reconvey, which constituted the defeasance. That contained a covenant on the part of Edwards to pay the amount of the note, with twelve per cent. interest. This covenant to pay \$195, with interest, superseded the necessity of retaining the note, and made it proper and consistent that it should be given up. In cases of this sort, the real character of the arrangement may as often be gathered from the nature of the transaction and character of the circumstances as from the express declaration of the parties. These, when considered, can leave the mind in but little doubt on the subject. It is manifest, beyond contradiction, that Brown did not wish to become the real purchaser of the land; but he wanted his money at the time agreed upon. Edwards did not wish to part with the land, but desired to give Brown the most perfect security upon it, that the money should be promptly paid. The value of the land, as compared with the amount of money to be paid, is strongly indicative of the character of the transaction. The land was worth from \$600 to \$800, while the money due and to be secured was but about \$200. Both parties expressed the intention at the time of the transaction, that if the money was not paid at the day stipulated, Brown should have the right to sell the land to the first purchaser, to raise the money. Could it have been the intention of the parties, that Brown should retain the

surplus of the money to be realized for the land after paying the amount due him? That would clearly have been carrying the transaction beyond the evident intention of both parties. No speculation was designed for Brown, but a security that he should certainly realize his money. If that was the case, then the arrangement amounted to a mortgage. If it was a mortgage at the time, it must ever bear that character. The agreement to reconvey upon the payment of the amount for which the conveyance was made, with interest, was made at the same time of the conveyance, and in pursuance of the same agreement, and was a part of the same transaction; and they must both be taken together, as constituting one entire arrangement, as much so, indeed, as if they had both been written upon the same piece of paper, and expressly referring to each other. Had they been thus executed, they would have constituted a mortgage, not only in substance, but in form also. A court of chancery disregards the form, and seeks for the substance of the transaction. It is by no means necessary, in order to constitute a mortgage, that the deed and defeasance should be contained in the same instrument, or that they should even refer to each other. Their connection may be shown by parol. Indeed, it is not absolutely necessary that the defeasance should be in writing at all. The conveyance may be absolute on its face, and yet it may be shown, by parol, that it was intended only as a security for the payment of money, when it will be treated in equity as a mort-These principles are too familiar to require authorities for their gage. Decree reversed. support.

GOODMAN v. GRIERSON.

COURT OF CHANCERY OF IRELAND, 1813.

[2 Ball & B. 274.]

BILL FOR REDEMPTION. James Goodman, the father of the plaintiff, being seised of the lands of Creaghmore, subject to a charge of £1,000, to his sister Sarah, the wife of Ralph Higgins, on the 13th of December, 1788, conveyed his interest in those lands to trustees, for Higgins and wife; the deed recited, that the trustees, with the consent and approbation of Higgins and wife, had agreed to accept of the lands of Creaghmore, in lieu and satisfaction of the sum of £1,000, and that James Goodman, in consideration thereof, and in lieu and satisfaction of the said sum of £1,000, had agreed to assign

his interest in the lands to the trustees; but subject to redemption as thereinafter mentioned. The deed then contained a covenant, that if James Goodman, his heirs, &c., should at any time after, within the space of ten years next ensuing the date thereof, pay the said sum of £1,000, that the trustees would reconvey to him the lands.

THE LORD CHANCELLOR. The fair criterion, by which the court is to decide whether this deed be a mortgage or not, I apprehend to be this, are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to? I conceive he has not. Suppose, for instance, the defendants to file a bill of foreclosure, by the practice of this court, the decree is for a sale of the mortgaged premises, if they be not redeemed within the time limited by the course of the court; suppose the sale to take place, and the produce to be insufficient to discharge the £1,000, and costs, how is the deficiency to be raised? What remedy could the defendant then have? If it were a mortgage, he in that case might proceed on his covenant or bond; or if no covenant or bond, upon the implied assumpsit; but how could any action be maintained in this case, where the defendants have taken the conveyance, not as a security, but expressly in lieu and satisfaction of the portion of £1,000. This appears to me decisive to show, that the transaction between these parties was not that of a mortgage, but a conditional sale; for if the defendants have not all the remedies of a mortgagee, why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limit agreed upon by the parties to this deed? There would be much hardship and inconvenience to the one party; and there appears to me to be no substantial ground to entitle the other to relief. The cases upon this subject are collected by Mr. Butler in a note to his edition of Coke upon Littleton.

Bill dismissed without costs.

EARP v. BOOTHE.

COURT OF APPEALS, VIRGINIA, 1874.

[24 Gratt. 368.]

[Brightwell had entered into an agreement with Earp to sell him a certain tract of land for \$700. To get funds to complete the purchase Earp entered into an agreement with Boothe by the terms of which it was agreed that Boothe was to have a parcel of the land, thirty or forty acres, and Earp was to have the remainder eventually, but in the meantime Boothe was to pay \$700 to Brightwell and take the title himself. If Earp did not repay Boothe his share, as he agreed, within three years with interest, he was to lose all rights. Earp having defaulted, Boothe brought this bill.]

CHRISTIAN, J., delivered the opinion of the court.

It is often difficult to distinguish a conditional sale from a mortgage.

The line of discrimination is confesse, but a privilege is conferred, proin a great measure depend upon its time, there the party claiming that erally speaking the difference between was paid accordingly: as in a case rity for a debt, the other a purchase er cent with a proviso that 4 per become absolute in a particular event in a limited time after it becomes agreement to resell upon particular te, the renewal of a lease on the paytain the character of the transaction riod. upon the face of the transaction it tended to make a mortgage or a contiff is, therefore, not entitled to the always incline to consider it a mortaill; and the bill must be dismissed tional sales oppression is frequently are too often made the vehicle of ex-85, and cases there cited; Poinde 375-376.

Here it is admitted that the lated times, and no fraud, surprise,

MILLIKEN.

But this court has fixed the criter ing the character of the transaction Upper Canada, 1866. conditional sale or a mortgage.

& Wheeler, 2 Call, 421, Pendleton that the contention of the defenddifficult question to draw the line b treat of a purchase, the value of the Pendleton, has been adopted in 2 Rob. Prac. (old ed.) 51, and case

Tried by these criteria and the

that (except as to the small tract shoes of Earp, as purchaser from I the parties must be treated, as to not as a conditional sale. As to negotiation as to the price. Earp from Brightwell: "Some tin respect than he is now. finding he was unable to pay for i not decree for a force! for him to Brightwell the said sum cept as to costs. defendant, in his answer, says thi the money to pay Brightwell for the the only terms upon which the plain was upon the terms set forth in th thus clear that the transaction betw lending of money, and not for a sa quantity above referred to. The loan of money, and security for its

In: Ch. 236.1

But the great desideratum nt does not merely give an option ground of their decision, is, whethe contains an express and absolute price fixed; or whether the object v the distinction between an option or pledge for the repayment intende or circumstances, this question of set a mere option to the grantee to See King v. Newman, 2 Munf. 4(the time of executing the conveythe transaction as a mortgage; but ase and pay the money is exacted to show the real character of the purchased at a stipulated price, Boundary the form of it is a sale. There distinguish the latter case from a e plaintiff had every remedy which Not case of default, he could enforce Not an ejectment for the possession of negotiation was for a loan of mone ded that, had the transaction been tiff in his bill. He says, after settitiff would have been entitled to a ual decree for a foreclosure or sale

his interest in the lands to the tredly indistinct, and each case must thereinafter mentioned. The decown peculiar circumstances. Genif James Goodman, his heirs, &cen them is, that the one is a secuthe space of ten years next ensu for a price paid, or to be paid, to sum of £1,000, that the trustees w; or a purchase accompanied by an

THE LORD CHANCELLOR. The rms. The only difficulty is to ascerto decide whether this deed be a 1. It may be premised that where this, are the remedies mutual and is doubtful whether the parties inthe remedies a mortgagee is enditional sale, courts of equity will Suppose, for instance, the defendage, because by means of condithe practice of this court, the dec exercised over the needy, and they premises, if they be not redeemctortion. 1 Hilliard on Mortgages, course of the court; suppose the sxter v. McCannon, 1 Dev. Eq. R. to be insufficient to discharge the

ciency to be raised? What remecia which must govern in determinIf it were a mortgage, he in that a, whether it is to be considered a
or bond; or if no covenant or bon the case of Robertson v. Campbell
how could any action be maintained, J., said: "It is often a nice and
have taken the conveyance, not aetween mortgages and conditional
and satisfaction of the portion of a which this court has made the
sive to show, that the transaction is the purpose of the parties was to
of a mortgage, but a conditional se commodity contemplated, and the
all the remedies of a mortgagee, was a loan of money, and a security
provisions of this deed, to hold ited." This rule, laid down by Judge
the condition beyond the limit agreeal cases decided by this court,
deed? There would be much hard); Moss v. Green, 10 Leigh, 251;
party; and there appears to me to s there cited.

the other to relief. The cases upo authorities above cited, it is plain, Butler in a note to his edition of Co of thirty or forty acres, which was

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EARP v. this part of the land, there was no Court of Appealaing was said as to its value. The [24 Gray; and it is so treated by the plaining forth the purchase of the land by

[Brightwell had entered into ane in the year 1862 the said Earp, a certain tract of land for \$700.t, applied to your orator to advance purchase Earp entered into an agre of \$700.00, with interest," &c. The which it was agreed that Boothe at he applied to plaintiff to borrow thirty or forty acres, and Earp was 1e land purchased of him; and that but in the meantime Boothe was toutiff would agree to lend respondent, the title himself. If Earp did note covenant filed with the bill. It is agreed, within three years with inveen the parties was a borrowing and Earp having defaulted, Boothe brole of the land, except as to the small

Christian, J., delivered the opinionly object of the negotiation was a It is often difficult to distinguish a repayment. In such cases the con-

no stipulation for penalty or forseiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege must show that the money was paid accordingly: as in a case of interest reserved on a loan at 5 per cent with a proviso that 4 per cent will be accepted, if paid within a limited time after it becomes due; or in the case of a covenant for the renewal of a lease on the payment of a certain fine at a stated period. Here it is admitted that the rent was not duly paid at the stipulated times, and no fraud, surprise, or accident is alleged; and the plaintiff is, therefore, not entitled to the repurchase which he claims by this bill; and the bill must be dismissed with costs.

HAWKE v. MILLIKEN.

COURT OF CHANCERY, UPPER CANADA, 1866.

[12 Grant Ch. 236.]

Mowar, V. C. I think it clear that the contention of the defendant is well founded. The agreement does not merely give an ontion to Norman to repurchase, but it contains an express and absolute undertaking on his part to buy, and to pay for the property the sum specified. Now I understand that the distinction between an option to repurchase and an obligation to purchase, is the very distinction on which, in the absence of other circumstances, this question of mortgage or sale may depend; that a mere option to the grantee to purchase, though stipulated for at the time of executing the conveyance, is not sufficient to establish the transaction as a mortgage; but that when an obligation to purchase and pay the money is exacted -from the grantee, that is sufficient to show the real character of the transaction to be a mortgage, though the form of it is a saic. There is indeed nothing but the form to distinguish the latter case from a mortgage. In the present case, the plaintiff had every remedy which as mortgagee he could have. In case of default, he could enforce payment of the money, or bring an ejectment for the possession of the property. It was not contended that, had the transaction been in form of a mortgage, the plaintiff would have been entitled to a more advantageous decree in any respect than he is now.

There will, therefore, be the usual decree for a foreclosure or sale (at the option of the plaintiff), except as to costs.

SECTION II. - ABSOLUTE RESERVATION.

BUBB'S CASE.

CHANCERY, 1678.

[Freeman, Ch. 38.]

Bubb did contract with A. for a parcel of land for £5,000, and paid him £140 in part, but before the rest of the money was paid, or any conveyance executed, A. dies, and makes B. his executor, C. being his heir.

B. prefers a bill against Bubb and C. to have the rest of the purchase money; who answered that they did not intend to proceed with the bargain, and Bubb said he was willing to lose his £140 that he had paid.

In this case it was agreed, that Bubb, who was the purchaser, might have referred his bill against the heir, to have had an execution of a conveyance pursuant to the agreement, by reason the agreement was executed in part in the testator's lifetime, by the payment of £140.

But it was insisted by the counsel of Bubb, that by reason he (being the purchaser) did not desire an execution of the agreement, and being content to lose what money he had paid, that the executor should not compel them to it.

But the court ruled that the executor should have the money, and that Bubb might when he pleased compel the heir to execute a conveyance of the estate.

Note. That the court took this to be a juggle betwixt Bubb and the heir, supposing that the heir had agreed to pay back the money to Bubb, and so to have kept the land, which was worth much more; for now the heir was to convey the land, but to have nothing for it, for the executor was to have the money

PAINE v. MELLER.

CHANCERY, 1801.

[6 Ves. 349.1]

Upon the first of September, 1796, the plaintiffs sold to the defendant by auction some houses in Ratcliffe Highway, upon the usual terms, a deposit of £25 per cent and a proper conveyance to be executed upon payment of the remainder of the purchase money at Michaelmas next. Before the conveyance was perfected the houses were burnt. The bill was then filed praying specific performance.

THE LORD CHANCELLOR [ELDON]. First, it is said, the title was never accepted in fact; 2dly, if not, under these circumstances a court of equity will not compel a specific performance. As to the second point the objection is grounded upon two circumstances: 1st, the simple fact of the fire; 2dly, that the premises had been insured prior to the contract; that that fact and the fact, that the insurance expired at Michaelmas, 1796, were not disclosed; and that the premises afterwards remained uncovered by any insurance. The authority of Sir Joseph Jekyll has been mentioned: but no case has been cited in support of that dictum; and it is in a degree suggested, not admitted at the bar, that it may be considered over-ruled by subsequent cases. As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and pur-They are vendible as his, chargeable as his, capable of being encumbered as his, they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it. As to the annuity cases and all the others, the true answer has been given; that the party has the thing he bought; though no payment may have been made; for he bought subject to contingency. is a real estate, he of course has it.

Then as to the non-communication, I cannot say, that in my judgment forms an objection: for I do not see how I can allow it, unless I say, this court warrants to every buyer of a house, that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value, or near it. The question, whether insured or not, is with the vendor solely, not with the vendee; unless he proposes something upon that; and makes

¹ This case is abridged. - ED.

it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured. I am therefore of opinion, that if the agent on behalf of this purchaser did accept this title previously to the destruction of the premises, the vendors are in the situation, in which they would have been, if the title and the conveyance were ready at Michaelmas, 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burnt down on the quarter day.¹

OSBORN v. SOUTH SHORE CO.

SUPREME COURT, WISCONSIN, 1895.

[91 Wis. 526.]

APPEAL from a judgment of the Circuit Court for Bayfield County: John K. Parish, Circuit Judge. Affirmed.

Plaintiff sold to defendant a quantity of saw logs, to be paid for at the rate of \$6.10 per thousand feet, according to the scale to be thereafter made on the mill deck. The logs were delivered in defendant's boom at defendant's mill, and taken charge of by it, and plaintiff did all that he was to do under the contract. The contract contained the following provisions:

"It is expressly understood and agreed by the parties hereto that the legal title to and right of possession of said logs, and the lumber to be manufactured therefrom, shall be and remain in the party of the first part as security for the unpaid purchase price, until the same shall have been fully paid, and that the party of the second part will at all times keep on hand a sufficient quantity of said logs or lumber, separately piled, to secure the balance owing the party of the first part, the party of the second part having the right to sell and dispose of said logs and lumber for which full payment shall have been made; and in case of default of the party of the second part in making any of the payments hereunder, or in case of failure on his part to perform any of the conditions hereof, the party of the first part shall have the right to take immediate possession of said logs or lumber, and sell and dispose of the same at public auction, upon giving ten days' notice, for the purpose of satisfying the balance due by virtue of this contract and all

¹ Accord: Osburne v. Nicholson, 13 Wall. 654; Willes v. Nozercraft, 22 Cal. 607; Sherman v. Lehr, 57 Ill. 509; Davidson v. Hawkeye Co., 71 Ia. 532; Gammon v. Blaisdell, 45 Kans. 221; Cottingham v. Ins. Co., 90 Ky. 301; Skinner v. Houghton, 80 Ind. 308; Coggeshall v. Bank, 63 Ohio, 88; Elliot v. Ashland Co., 117 Pa. 460; Hugermin v. Courtney, 21 S. C. 403. Contra: Cutcliffe v. McAnally, 88 Ala. 570; Gould v Mursh, 70 Me. 288; Thompson v. Gould, 20 Pick. 134; Wilson v. Clarke, 60 N. H. 352.— ED.

costs and expenses in taking, keeping, and disposing of said property, and retain the same out of the proceeds of said sale, returning the surplus proceeds of said sale to the party of the second part."

Some of the logs were lost after they were delivered into defendant's possession as before stated, by being broken out of the boom by the movements of a lumber boat. Proof of the whole amount of logs delivered, including those not scaled on the mill deck because lost, was permitted.

Defendant requested the court to charge the jury, in effect, that plaintiff was not entitled to recover for the lost logs, which was refused, and defendant excepted. The court then charged the jury in effect, that all logs delivered, including those lost, should be paid for, which was excepted to by the defendant.

There was a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant appeals.

MARSHALL, J. The sole question presented is whether defendant is liable for the logs that were lost, in view of the fact that plaintiff retained the title solely as security, and that such logs were never scaled on the mill deck.

Where property is sold and delivered, and the vendor has fully performed all the conditions of the contract of sale on his part, and the intention of the parties at the time of the making of the contract, as in this case, clearly is that the vendor is to have no interest in the property after delivery, except as security for the unpaid purchase money; that, subject to the right to resort to said property as such security, the entire dominion and control over the same are turned over to and assumed by the vendee, as such, although, for the purpose of retaining effectually the security, the contract of sale provides that the title and right of possession shall remain in the vendor, as security, until the purchase price is fully paid, and though the amount of the property is yet to be ascertained by a measurement in order to determine the amount of the purchase money, - if any of such property is lost after such delivery, before measurement, such loss must fall upon the vendee, whether the loss accrues through his negligence or otherwise, and the amount of such lost property may be ascertained by competent evidence. The relation of the parties to each other in respect to the question here presented, in such a case, is the same as between a mortgagor and a mortgagee of personal property, though the form of the instrument be that of a conditional sale; and the authorities holding that in case of a conditional sale, strictly so called, the risk of loss is on the vendor till title actually vests in the vendee, have no application whatever to such a state of facts. The conditional vendee, having possession subject only to the vendor's reservation of title as security for the unpaid purchase money, is in a sense the owner; if he pays the purchase money, he becomes the absolute owner, without any new transaction or bill of sale; if the goods be wrongfully taken away from him by a third party, he may recover their full value

of the wrongdoer; and if the property is lost or stolen while in his possession, whether by or without fault on his part, he must nevertheless pay the full price agreed upon. Tufts v. Griffin, 107 N. C. 49; Burnley v. Tufts, 66 Miss. 49.

The ruling challenged on this appeal is substantially in accordance with the law as here stated, and it follows that the judgment of the circuit court must be affirmed.

Judgment affirmed.1

MOSES BROTHERS v. JOHNSON.

SUPREME COURT, ALABAMA, 1889.

[88 Ala. 517.2]

APPEAL from the City Court of Montgomery, in equity. Heard before the Hon. Thos. M. Arrington.

The bill in this case was filed on the 26th August, 1889, by Moses Brothers, suing as partners, against Berry Johnson; and prayed an injunction, to restrain the defendant from cutting timber on a tract of land which the complainants had sold to him, except for repairs, fences, and other necessary purposes. An injunction was granted on the filing of the bill; and after answer filed, the defendant submitted a motion to dissolve it, both for want of equity in the bill, and on the denials of the answer. The court sustained the motion, and dissolved the injunction; and its decree is here assigned as error.

STONE, C. J. The appellants, who were the complainants, sold one hundred and sixty acres of land to the defendant, at the agreed price of fourteen hundred and forty dollars — nine dollars per acre. Only five dollars of the purchase-money was paid. The balance, including interest, was agreed to be paid in annual installments, running through about five years from the date of the purchase, January 5, 1889. Complainants retained the title, giving to Johnson, the purchaser, their obligation to make him title on payment by him of the purchase-money, and accruing taxes. The agreement stipulated further, that if Johnson failed "to pay any of said installments when due," then Moses Brothers "have the right to annul this agreement, and take possession of the premises, and to retain out of the moneys paid under this agreement [by Johnson] sixty dollars per annum as rent of the premises, said amount being hereby agreed and declared by said parties to be the

¹ Accord: Brown v. Hare, 4 H. & N. 822; Hessellbacker v. Ballantyne, 28 Ont. 182; Bunley v. Tufts, 66 Miss. 48; Tufts v. Wynne, 45 Mo. App. 42; Tufts c. Griffin, 107 N. C. 47; Topp v. White, 12 Heisk. 165. Contra: Bishop v. Minderhout, 128 Ala. 162; Glisson v. Heggie, 105 Ga. 30; Sloan v. McCarty, 134 Mass. 245.—ED.

² This case is abridged. — ED.

annual rental value of the premises; returning the surplus, if any, to" Johnson.

When a vendor of real estate enters into an executory agreement to convey title on the payment of the purchase-money, he sustains, in substance, the same relation to the vendee, as a mortgagee does to a mortgagor. Each has a legal title, which, in the absence of stipulations for possession, will maintain an action of ejectment. Each can retain his legal title against the other party, until the purchase-money, or mortgaged debt, is paid, unless he permits the other to remain in undisturbed possession for twenty years. And yet each is at last but a trustee of the legal title for the mortgagee or vendee, if the purchase-money, or mortgage debt, as the case may be, is paid, or seasonably tendered. The same mutual rights and remedies, legal and equitable, and the same limitation to the right of recovery, obtain in the one relation and in the other. Relfe v. Relfe, 34 Ala. 500; Bizzell v. Nix, 60 Ala. 281; Chapman v. Lee, 64 Ala. 483; Sweeney v. Bixler, 69 Ala. 539.

We have found but a single case precisely like the present one in its facts. In Scott v. Wharton, 2 Hen. & Munf. 25, a sale of land had been made on a credit, and title retained by the vendor. The vendee went into possession, and a bill was filed by the vendor, charging him with committing waste by cutting timber, and praying for an injunction. The court treated the case precisely as if it had been a bill by mortgagee against mortgagor, to restrain him from lessening the security by felling and removing the timber. Fairbank v. Cudworth, 33 Wis. 358.

We feel safe in holding, that a vendor who sells on credit, retaining the title as security for the purchase-money, sustains the same relation to the vendee, so far as the question of security is concerned, as does the mortgagee to the mortgagor.

In Coker v. Whitlock, 64 Ala. 180, this court ruled, that when the mortgagor is committing waste which impairs the security, or renders it insufficient, chancery, at the suit of the mortgagee, will restrain him by injunction. Coleman v. Smith, 55 Ala. 368; Hammond v. Winchester, 82 Ala. 470; Sullivan v. Rabb, 86 Ala. 433; also, 2 Dan. Ch. Prac. 1629, n. 3; Usborne v. Usborne, 1 Dickens, 75; Brady v. Waldron, 2 John. Ch. 148; Robinson v. Preswick, 3 Ed. Ch. 246; Murdock's Case, 2 Bland, 461; Downing v. Palmeteer, 1 Mon. 64.

However it may be made to appear by proof, the pleadings do not make a case for a dissolution of the injunction; and the decretal ordered dissolving the injunction must be reversed, and the injunction reinstated.¹

Reversed and rendered.

¹ Compare: Crockford v. Alexander, 15 Ves. 138; Miller v. Waddington, 91 Cal. 377; Sewall v. Slocum, 112 Ga. 279; Baldwin v. Pool, 74 Ill. 97; McCaclin v. Stall, 44 Ind. 151; Jennison v. Stone, 33 Mich. 99; Scott v. Wharton, 2 Hen. & M. 25.—Ames: Cases on Equity, 222 n.

ACLAND v. GAISFORD.

CHANCERY, 1816.

[2 Madd. 28.]

THE Original Bill was filed 31st May, 1809, by T. P. Acland, praying, that David Cuming, the Defendant (since deceased), might specifically perform his Contract to sell to the Plaintiff the Fee Simple of an Estate, called Stone, and Stone Down at Exford, in Somersetshire; and that the Defendant might be decreed to allow the Plaintiff Interest on the Purchase Money, £2,900. The Purchase Agreement was dated 4th June, 1807, and the Purchase Money was agreed to be paid on or before the ensuing 25th March, if a tender of a proper Conveyance was made. The Estate was in the possession of one —— Pitts, as Tenant to the Vendor, whose Tenancy expired at Lady-day, 1808.

THE VICE-CHANCELLOR. The Master having reported that a good Title can be made to this Estate, and that David Cuming, deceased. the Defendant to the original Bill, could make a good Title before the filing of the original Bill, Mr. Acland, the Plaintiff in that Suit, must pay the Costs of it, and so much of the Costs of the Supplemental Bill as relate to the original Suit; but I shall not give any Costs in the supplemental Suit. One question is, What Interest Acland is to pay on his Purchase Money? It has been contended that he should pay £5 per Cent. on his Purchase Money, because he, in a Letter stated in the original Bill, and admitted in the Answer to that Bill, applied to Cuming for his consent to lay out the Purchase Money in Exchequer Bills, to which Cuming returned no answer; but in fact, the Purchase Money was laid out in Exchequer Bills. This does not vary the general Rule. Cuming not having assented to the Purchase of the Exchequer Bills, Acland was alone subject to all the risk; and the Plaintiff in the Supplemental Bill cannot now claim the benefit of that Purchase; but Acland must pay his Purchase Money, with £4 per Cent. Interest. Another Question that has been made, is, Whether the Decree should not go farther than in ordinary cases, and direct, in favour of Acland, an Account of the Rents and Profits of the Estates, which were, or which, without his wilful default, might have been, received?

I have not found any authority which determines what is to be done with the Estate during the interval when the Title is under dispute; during the suspension of an Executory Contract. In Equity, an Estate agreed to be purchased is considered as the Estate of the Purchaser from the time of the Contract, and the Purchase Money from that time is held to belong to the Vendor; but with respect to Possession, there is no change in the notion of Equity, until the Purchase Money is paid. The Vendor has a clear right to keep Possession until the Purchase Money is paid; if the Purchaser enters before he has

paid his Purchase Money, he is a Trespasser. Quoad Possession, the Estate belongs to the Vendor—it is not the Estate of the Vendee for the purpose of Possession; for though in many cases the Purchaser is responsible, as if there be a Fire, still as to Possession, the right is in the Vendor, till his Purchase Money is paid.

What has been decided as to responsibility for the Purchase Money? If the Purchaser suffers the Money to lie dead, it is matter of indifference to the Vendor: Why? Because the Vendee having the Money, must take care to employ it. Roberts v. Massey, is an authority to show that the Vendor is entitled to his Purchase Money and Interest. though the Vendee has kept it at his Banker's unemployed. Vendor, therefore, may call for Interest upon his Purchase Money, although the Vendee has suffered it to lie dead. Then, to pursue that principle, must not the Vendor, the legal Owner of the Estate, by a parity of reasoning, take care of the purchased Estate? He must. he has received Rent, he must account for it; if he has suffered Tenants/ to run in arrear, he is responsible for the loss thereby occasioned. If Possession of the Estate was given, or any Tender of Possession was made to the Defendant, or the Defendant exercised acts of Ownership over the premises, that may make a difference. These Facts are not now before me. If the Parties wish, they must be inquired into.

CARPENTER v. SCOTT.

SUPREME COURT, RHODE ISLAND, 1881.

[13 R. I. 477.]

Matteson, J. This is an action of replevin to recover possession of a rolling mill, attached by the defendant, a deputy sheriff. On the seventeenth day of November, 1879, the Willets Manufacturing Company delivered to John Anthony the mill in question under an agreement, purporting to be a lease, by which Anthony was to pay them for the mill five hundred dollars, in twenty monthly instalments of twenty-five dollars each, the first on the date named and the rest on the seventeenth day of each succeeding month, with interest at seven per cent per annum. If Anthony failed to make any payment within five days after the date specified for such payment, the Willets Manufacturing Company might terminate the contract and take immediate possession of the mill. At the expiration of the lease, Anthony, having complied with its conditions,

was to receive a bill of sale of the mill. At the date of the delivery of the mill to Anthony, he was a member of a partnership composed of Thomas Anthony, Thomas J. Linton, and himself. The business of the partnership was at that time, and until the eleventh day of March, 1880, continued to be, transacted in the name of John Anthony. The contract for the mill, though in his name, was for the benefit of the partnership, and the partnership funds were used for the first payment, and for the successive payments of the instalments as they became due. On the eleventh day of March, 1880, the partnership, under the name of John Anthony & Co., executed and delivered to the plaintiff a mortgage, signed by each of the partners, and purporting to convey, besides their other property, the mill in question, "subject to a certain claim of the Willets Manufacturing Company." In July following John Anthony withdrew from the partnership, and the business after that date was conducted under the name of Thomas Anthony & Co. On the twenty-second day of June, 1881, the last instalment of the rent, or price, of the mill was paid, and the Willets Manufacturing Company gave a receipted bill of sale of it to Thomas Anthony & Co. This bill of sale named John Anthony as the vendee, and acknowledged payment of the price by Thomas Anthony & Co., for John Anthony. On the same day the Willets Manufacturing Company brought suit against John Anthony for an indebtedness of his to them, and delivered the writ to the defendant for service, which was made in part by attaching the mill replevied in this suit.

The question raised by the foregoing facts is, whether the mortgage to the plaintiff, in so far as it purports to convey the rolling mill, is valid as against the attachment of the Willets Manufacturing Company. We think it is. Such a transaction as that above described, by which the mill in question passed into the possession of John Anthony, though in form a lease, is regarded in law as a conditional sale. Fairbrother, 12 R. I. 233; Currier v. Knapp, 117 Mass. 324; Greer v. Church & Co. 13 Bush (Ky.), 430, 433, 434. Under it the vendee acquires, not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can devest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale, or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or in the event that he has sold, or mortgaged it, in his vendee, or mortgagee, without further bill of sale. Day v. Basset, 102 Mass. 445, 447; Crompton v. Pratt, 105 Mass. 255, 258; Currier v. Knapp, 117 Mass. 324, 325, 326; Chace v. Ingalls, 122 Mass. 381, 383. It follows from these principles, that immediately on payment of the last instalment of the price, the title to the rolling mill vested in John Anthony, or in him and his copartners, it is immaterial which, and that, thereupon, the plains tiff's mortgage became valid, and entitled to priority over the attachment of the Willets Manufacturing Company subsequently made.

The defendant contends that the plaintiff's mortgage is invalid as against the attachment, because the plaintiff had never taken possession of the rolling mill under it. In support of this claim he cites Williams v. Briggs, 11 R. I. 476, and Cook v. Corthell, 11 R. I. 482. These cases are, however, widely different from the present. They do, indeed, hold that, at law, a mortgage of personal property to be subsequently acquired conveys no title, unless possession of the property when acquired is given to, or taken by, the mortgagee. They rest upon the familiar maxim, that no one can grant, or charge, that which he does not have. At the execution of the mortgages the mortgagors had no interest whatever in the property, the title to which was involved in these suits. was property which was to come into their possession, and in which they were to acquire an interest, in the future, and which might not have been in existence, even, when the mortgages were made. present case, on the contrary, the mortgagors at the making of the mortgage had the possession of the property, with the right to its possession and use, and the right to become its absolute owners on complying with the conditions of the sale. These rights constituted an actual, present interest in the property, which, as we have seen above, is capable of transfer by sale or mortgage.

In accordance with the stipulation of the parties, judgment is rendered for the plaintiff for costs.

Judgment for plaintiff for costs.

LIPPINCOTT v. SCOTT.

SUPREME COURT, PENNSYLVANIA, 1901.

[198 Pa. St. 283.]

REPLEVIN to recover a soda fountain.

PER CURIAM, January 7, 1901: The appellant asserts that the principal question for consideration in this case is whether the agreement for the transfer of the soda water fountain was a bailment or a conditional sale. The jury found by their verdict that it was a bailment. If the verdict was warranted by the evidence and no error was committed in the instructions to the jury, the verdict and the judgment thereon must prevail against the appellant's claim. The written agreement of the parties appears on its face as a bailment. It is clearly within Rowa v. Sharp, 51 Pa. 26, Enlow v. Klein, 79 Pa. 488, Brown v. Billington, 163 Pa. 76, and Ditman v. Cottrell, 125 Pa. 606. The effort of the appellant to make the agreement appear as a conditional

sale has no material or satisfactory evidence to support it. As to the instructions complained of it is sufficient to say that we have discovered no error, or anything of an unfair or partial nature in them.

Judgment affirmed.1

STRAUSS SADDLERY CO. v. KINGMAN & CO.

COURT OF APPEALS, MISSOURI, 1890.

[42 Mo. App. 208.2]

Biggs, J. This is an action for goods sold and delivered, amounting, at the contract price, to the sum of five hundred dollars. The cause was submitted to the court without a jury, and the finding and judgment were for the defendant. The plaintiff appealed.

The plaintiff's evidence tended to prove that, for the year 1887, the plaintiff and defendant did business with each other under the following written agreement, to wit:

- "Memorandum agreement made and entered into this second day of February, A.D. 1887, by and between Jacob Strauss Saddlery Company of St. Louis, Missouri, party of the first part, and Kingman & Co. of Peoria, Illinois, and of St. Louis, Missouri, party of the second part, witnesseth:
- "First. That the party of the first part agrees to furnish the said party of the second part with harness of their manufacture at ten (10) per cent discount from list prices now in force, for the season of 1887, and agrees to carry with the said party of the second part, at Peoria, a stock amounting at net prices to not over five hundred (\$500) dollars.
- "Second. The party of the second part is to make report of goods sold, on or about the first of each month, the net amount to be due and payable in ninety days from date of said report; or if cash is remitted by party of the second part three per cent discount will be allowed."

The plaintiff also introduced evidence tending to prove that, at the expiration of the agreement, it was renewed for the year 1888; that, during the year 1888, the plaintiff delivered to the defendant, in pursuance of this agreement, goods to the amount of thirty-four hundred and four dollars and eighty-four cents; that, on account of goods so sold, the defendant remitted only the sum of twenty-nine hundred and four dollars and eighty-four cents; that, at the close of the year 1888, there remained unaccounted for in the hands of the defendant a lot of harness

Accord: Hunt v. Wyman, 100 Mass. 198. — ED.

² This case is abridged. — ED.

of the value of five hundred dollars, which the defendant refused to either pay for or return.

The defendant admitted the agreement, and it also admitted that, during the year 1888, it had received five hundred dollars' worth of goods under it, for which it had rendered no account. As an excuse for not returning or paying for the goods the defendant introduced evidence to the effect that, during the year 1888, the house in which it was doing business was destroyed by fire, and that, of the goods received under the contract, seven hundred and fifty-six dollars' worth was consumed; that the goods were stored in a reasonably safe place, and the fire did not occur through the defendant's neglect; that, after the fire, and prior to the institution of this suit, the defendant paid to the plaintiff one hundred and thirty-six dollars and sixty cents, which paid in full for all goods received in excess of five hundred dollars.

Upon this statement of the evidence the defendant, on the one hand, denied legal liability to pay for the goods upon two grounds: First. That the delivery was merely for the purposes of a sale to take effect upon the happening of a condition. Second. That the defendant held the goods for the plaintiff on consignment. On the other hand, the plaintiff urges that the transaction in reference to the goods was one of "sale or return," and, as the defendant neither returned nor paid for the goods at the end of the year, its right of action for goods sold and delivered became complete.

If the delivery of the goods under the agreement, when viewed in the light of the subsequent correspondence between the parties, amounted to what is called a contract of "sale or return," then the title vested immediately in the defendant, and the loss must fall on it. Meldrum v. Snow, 9 Pick. 441; Hilliard on Sales (3d ed.), p. 28, § 3; Crocker v. Gullifer, 44 Me. 491; Buswell v. Bicknell, 17 Me. 344; Dearborn v. Turner, 16 Me. 17; Holbrook v. Armstrong, 10 Me. 31; Jameson v. Gregory, 4 Met. (Ky.) 363; Moss v. Sweet, 3 Eng. L. & E. R. 311; Hotchkiss v. Higgins, 52 Conn. 205. Addison in his work on contracts thus defines such a sale: "When goods are sold under a contract of sale or return, the sale is a conditional or defeasible sale. The right of property in the goods passes to the purchaser, subject to be devested out of him and revested in the vendor by a return of the goods to the latter, in accordance with the terms of the contract." Addison on Contracts (8th ed.), *991.

The application of legal rules to the agreement, as interpreted by the parties themselves, is somewhat troublesome. Our conclusion is that, when the contract expired, it was the duty of the defendant either to pay for or return, without demand, all goods received in excess of the value of five hundred dollars. If it failed to do this, it was liable to an action. As to such excess the dealings between the parties contemplated a contract of "sale or return." But we are of opinion that this rule ought not to be applied to the "stock of the value of five hundred dollars," which the plaintiff agreed to keep with the defendant. As to

this, other principles find application and must govern. It cannot be said that the defendant purchased the "stock" with the privilege of returning the same at the expiration of the contract, if unsold. Under the agreement the defendant only obtained the optional right to purchase it, in the event he found purchasers for the whole, or any part of it. The plaintiff was seeking a market for its goods, and, in order to induce the defendant to give its patronage, it was agreed that, of the goods furnished, five hundred dollars' worth was to be considered as stock furnished by the plaintiff.

Judgment affirmed.

CHICAGO EQUIPMENT CO. v. MERCHANTS' BANK.

SUPREME COURT, UNITED STATES, 1889.

[136 U. S. 268.1]

This action was brought by the Merchants' National Bank of Chicago against the Chicago Railway Equipment Company, a corporation of Wisconsin, upon two written instruments, one of which is in the words and figures following:

"\$5,000. CHICAGO, ILL., January 20, A.D. 1884.

"For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent per annum from date until paid.

"This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,249 inclusive, and marked on the side thereof with the words and letters Blue Line C. & E. I. R. R. Co.; and it is agreed by the maker hereof that the title of said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars.

"No. 1. Geo. B. Burrows, Vice-President."

This writing is indorsed: "Northwestern Manufacturing and Car Co., per J. C. Gorman, Treas."

[&]quot;Countersigned by E. D. Buffington, Treasurer."

¹ This case is abridged. — ED.

The other instrument bears the same date, and is in all respects similar to the first one. No question is made as to the genuineness of the signatures to these instruments of the vice-president and treasurer of the defendant, nor as to the plaintiff having paid value for them before maturity. They were declared upon as negotiable promissory notes. In support of the defence certain evidence was offered that was excluded, and the jury pursuant to the direction of the court returned a verdict in favor of the plaintiff for the full amount of the two instruments. 25 Fed. Rep. 809.

Mr. Justice Harlan, after stating the case in the opinion of the court as above reported, continued:

Are the writings in suit to be regarded as promissory notes to be protected, in the hands of bona fide holders for value, according to the rules of general mercantile law as applicable to negotiable instruments, or are they anything more than simple contracts subject, in the hands of transferees, to such equities and defences as would be available between the original parties? This is the question upon which, it is conceded, depends the correctness of the several rulings to which the assignments of error refer.

Turning to the notes here in suit, we find every element of a sale and transmission of ownership, despite the provision that the title to the cars should remain in the payee, until all the notes of the series were fully The notes, upon their face, show they were given for the "purchase price" of cars "sold" by the payee to the maker and they are "secured" equally and ratably on the cars, in order to prevent the holder of one of the notes from obtaining out of the common security a preference over holders of others of the same series. This provision placed the parties upon the same footing they would have occupied if a chattel mortgage, covering all the notes, had been executed by the purchaser of the cars. If the notes had been in the usual form of promissory notes, and the maker had given a mortgage back to the payee, the title would, technically, have been in the payee until they were paid. But they would, in such case, have been negotiable securitie protected in the hands of hong fide holders for value against secret defences, and their immunity from such defences would have been communicated to the mortgage itself. In Kenicott v. Supervisors, 16 Wall 452, 469, it was said that where a note secured by a mortgage is transferred to a bona fide holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defences are allowed against the mortgage than would be allowed were the action brought in a court of law upon the note. To the same effect are Carpenter v. Longan, 16 Wall. 271, 274. See also Swift v. Smith, 102 U.S. 442, 444; Collins v. Bradbury, 64 Maine, 37; Towne v. Rice, 122 Mass. 67, 73.

The agreement that the title should remain in the payee until the notes were paid—it being expressly stated that they were given for the price of the cars sold by the payee to the maker, and were secured

equally and ratably on the property - is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if. the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid-The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement, of the same kind, embodied in a separate instrument, in the form of a mortgage. So far as the notes upon their face show, the pavee did not retain possession of the cars, but possession was delivered to the maker. The marks on the cars showed that they were to go into the possession of the maker, or of its transferce, to be used. The suggestion that the maker could not have been compelled to pay if the cars had been destroyed before the maturity of the notes, is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee had no interest remaining in them except by way of security for the payment of the notes given for the price. The reservation of the title as security for such payment was not the reservation of anything in favor of the maker, but was for the benefit of the payee and all subsequent holders of the paper. The promise of the maker was unconditional.

Judgment affirmed.

OGG v. SHUTTER.

COURT OF APPEAL, 1875.

[1 C. P. D. 47.]

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant.

The declaration was for conversion of 251 sacks of potatoes.

Pleas, not guilty, and that the goods were not the plaintiffs' as alleged. Issues thereon.

The facts were as follows. The plaintiffs had, in January, 1874, entered into a contract with Mons. Paresys Loutre, of Merville in France, for the purchase from him of potatoes. The contract was contained in several letters between the purchasers and the vendor. The terms ultimately agreed on were as follows, viz. for twenty tons of potatoes, at 84 fr. per 1000 kilogrammes, deliverable in the course of the current month, free on board of a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain. It was also stipu-

lated that there should be a part payment of £30 in earnest of the bargain. The plaintiffs paid £30 in part payment, and the potatoes were shipped by the defendant's agent at Dunkirk under the contract on board the ship Blonde at Dunkirk for London, in sacks sent over for the purpose by the plaintiffs. The bill of lading taken by the defendant's agent made the goods deliverable to order.

The plaintiffs therefore refused to honor the vendor's draft with the bill of lading attached. One week later the defendant by order of the vendor's agent sold the goods.

LORD CAIRNS, C. In this case it appears, from the judgments below, that the Court of Common Pleas drew the inference of fact that the plaintiffs were not in default in refusing to accept the draft for £34 which was tendered to them for acceptance along with the bill of lading. We have been unable to reconcile this finding with the statements in the case, more particularly with the statement in paragraph 13 (9), which seems to us to show that the plaintiffs were in default. Taking this fact, as we understand it, we think that the judgment in favor of the plaintiffs is erroneous, and should be reversed. The transactions in which merchants shipping goods on the orders of others protect themselves by taking a bill of lading, making the goods deliverable to the shipper's order, involve property of immense value, and we are unwilling to decide more than is required by the particular case. But we think this much is clear, that where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we whink that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default. It is not necessary in this case to consider what would be the effect of an offer by the plaintiffs to accept the draft and pay the money before the sale, for no such offer Judgment reversed. in this case was ever made.

MIRABITA v. IMPERIAL OTTOMAN BANK.

COURT OF APPEAL, 1878.

[3 Exch. Div. 164.1]

Bramwell, L. J. This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the governing bargain between the plaintiff and Phatsea & Co., the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber, or bills of lading of them, until payment of the bill of exchange. No question arises as to the defendants' rights; for it was admitted, and properly admitted, that the defendants did wrong in refusing the amount of the bill, and selling the umber. On the other hand, there is no contract between the plaintiff and the defendants. So that in the result the case is reduced to this: When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, or right thereto, as to entitle him to maintain this action? It is argued that he had not, and the reason given is, that as the umber was not specific and ascertained, and as on shipment the shippers took a bill of lading to order, and gave an interest in it to Corkji, who transferred it to the defendants, no property passed; and for this a long series of authorities, begin-'ning with Wait v. Baker, 2 Ex. 1, and ending with Ogg v. Shuter, 1 C. P. D. 47, is cited. It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a jus disponendi. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor. This appears from Wait v. Baker: Gabarron v. Kreeft, Law Rep. 10 Ex. 274; and to some extent from Ellershaw v. Magniac, 6 Ex. 570. In the first case, Parke, B., expressly says that the vendee Baker could under the circumstances maintain an action against Lethbridge for having sold the barley to Wait. This property or power exists then; and therefore if the vendors of the umber had sold it to the defendants this action would not be maintainable. But in that case the defendants would have acquired a right, while, as I have said, it is admitted that no right in them can be relied on. I think it is not necessary to inquire whether what the shipper possesses is a property, strictly so called, in the goods, or a jus disponendi, because I think, whichever it is, the result must be the same, for the following reasons. That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the con-

¹ Only one opinion is printed. - ED.

tract they are at his risk. If lost or damaged, he must bear the loss. If specially good and above the average quality which the selled was bound to deliver, the benefit is the vendee's. If he pays the price, and the vendor receives it, not having transferred the property, nor created AW any right over it in another, the property vests. It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made; the defendants might have wrongfully withheld the bills of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether the vendor's right was a right of property or a jus disponendi; for whichever it was it was their intention that it should cease on the plaintiff's paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here. There is nothing in the authorities inconsistent with this. only case that may be thought to seem so is Wait v. Baker, supra, where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession, to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he chose to exact. Parke, B., says: "There is no pretence for saying that Lethbridge agreed that the property should pass." "There was nothing that amounted to an appropriation, in the sense of that term, which alone would pass the property." "There was no agreement between the two parties that that specific cargo should become the property of the defendant," the vendee. Here all the evidence shows that there was such an agreement. The arbitrator says it existed in fact at the time of shipment, but the subsequent conduct of both parties shows it. What seems decisive is this: the plaintiff must have a right against some one; has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, and he has done everything he was bound to do, treating the altered agreement as governing. No action therefore would lie against him. It must then be the defendants who are in the wrong. I think they are, that the property was to pass on payment, and consequently on tender of payment, of the bill of exchange; that the bill of lading was handed to the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange; that therefore the plaintiff can maintain this action, and the judgment should be affirmed. I would add that I agree with the reasoning of my Brother Cleasby in the court below; and I would further remark that I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the

coming into operation of the Judicature Acts. Cotton, L. J., has favored me with a perusal of his judgment, and I entirely agree with it.

VERNON v. STEPHENS.

CHANCERY, 1722.

[2 P. Wms. 66.]

THE plaintiff brought this bill for a specific performance of articles entered into by the defendant's father Stephens, to the plaintiff, for sale of the manor of Wheelock in Cheshire for £1,200 and 100 guineas.

There had arose some difficulty about the title, and the plaintiff insisting that the same was not good, without an act of Parliament, the defendant's father procured an act of Parliament; upon which the plaintiff paid part of the money, but making default in payment of the residue, the defendant's father brought a bill to have the residue of the money, or to be discharged of the articles.

Just before that bill was ready for hearing, the plaintiff and defendant's father entered into an order by consent, signed by both parties, and reciting the articles, by which the plaintiff agreed to pay the money by such a day, or in default thereof the articles to be delivered up and cancelled, and the defendant's father to hold the premises discharged of the articles. Then the plaintiff paid £1,000 in part, but made default in payment of the residue, and entered into another order by consent signed by both parties, whereby a further day was given, when, if the money was not paid, the plaintiff agreed to lose all the money which he had advanced before, and to lose the benefit of the articles, which were to be put into the hands of Mr. Cox the counsel, and delivered over to the defendant's father in default of payment, and in case of such default, the defendant's father to hold the premises discharged of the articles.

The plaintiff Vernon, having again made default, now brought this bill to have the purchase completed, on payment of what was due, with interest, and to be relieved against these orders.

LORD CHANCELLOR. Here have been solemn agreements that ought not slightly to be got over; but however, if the defendant has his money, interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff, to lose all the money which he has paid; lapse of time in payment may be recompensed with interest and costs; and as to these agreements, they were all intended only as a security for payment of

such cases is, that the money due ligations.

foreclosed of his equity of redempti appears, that the complainant did

to be enforced only in cases where
ey with which they might be disettled than that parties may make

HECKARD In this case the parties have so

Supreme Courtanguage.

as no remedy for a breach of the [34 Illon-performance. He was not hin-

MR. JUSTICE BECKWITH delivered of his obligations by any fraud, This is a suit in equity to engh circumstances equity must follow contract for the sale of a tract of la more right than a court of law to

On the eighteenth day of Septin of parties in regard to time, in bargained with the defendant in erro fraud, accident, or mistake has of \$900. One hundred and five rect of such stipulations, except on notes were given for the residue, ally deny the right of parties to before Oct. 25, 1857, and the other in great injustice to vendors. Sept. 1, 1858.

The contract between the partic are an article of commerce, it is should be paid at maturity; that theor to receive his money promptly. should be regarded as of the essence reduced to penury by neglect in payment of either of the notes wheame due. A vendor may require be considered as an avoidance of y to enable him to meet his own absolute forfeiture of all payments a stipulation may be inserted in ing first was paid at maturity, and a sessence. If courts were to allow other note was made on the sevent payments at the stipulated times, after it fell due.

The bill alleges a waiver by the negligence would be visited upon of the agreement; and sets up as are relief from the result of one's make the last payment at the time in such cases refuse to interfere; the discharge of his official duties as at law, if any they have, for the County.

There is no evidence of any waiv plaintiff in error might compel the in regard to time, and we think the nt in error, but if he should do so, cient. The term of the court at f the land would then exist which, required to attend, commenced on enforced. Equity would not allow might have employed some one to tesidue of the purchase money and tiff in error, if it was not convenient to collection no such equity arises.

Eversed, and the cause remanded.

Decree reversed.

coming into operation of the Ju, upon the contract be paid within favored me with a perusal of may direct, or that the vendee be with it.

cree reversed, and cause remanded.

v. SAYRE.

, Illinois, 1874.

VERNON v.

d the opinion of the court: [2 P. orce the specific performance of a

THE plaintiff brought this bill find in Fulton County.

entered into by the defendant's $f\epsilon^{amber}$, 1857, the plaintiff in error sale of the manor of Wheelock in or, to sell him the land for the sum

There had arose some difficulty of dollars were then paid, and two sisting that the same was not good one for \$494 100 payable on or defendant's father procured an er for \$300, payable on or before plaintiff paid part of the money,

the residue, the defendant's fathe's provided, that the above notes of the money, or to be dischargee time stipulated for their payment

Just before that bill was ready for the contract; and that the nonant's father entered into an order'n they should become due, should and reciting the articles, by whithe vendor's obligation, and as an money by such a day, or in defaultpreviously made. The note maturup and cancelled, and the defenda tender of the amount due upon the charged of the articles. Then the day of September, 1858, six days made default in payment of the re-

by consent signed by both partie vendor of the prompt performance when, if the money was not paid,1 excuse for the vendee's neglect to money which he had advanced be? required, that he was engaged in articles, which were to be put into clerk of the Circuit Court of Fulton

and delivered over to the defendar

in case of such default, the defender by the vendor of the stipulation e excuse alleged is entirely insufficharged of the articles.

The plaintiff Vernon, having ag which the defendant in error was bill to have the purchase comple he sixth day of July, 1858, and he with interest, and to be relieved ransact his business with the plain-LORD CHANCELLOR. Here have it to attend to it in person. Such

not slightly to be got over; but money, interest and costs, he will I suffered; on the contrary, it would plaintiff, to lose all the money which ment may be recompensed with agreements, they were all intende

an excuse, if allowed, would exempt the clerks of many courts in this State from ever discharging their obligations.

From the allegations of the bill it appears, that the complainant did not have the money to make the last payment at the time it became due; and stipulations like the one in the contract under consideration, would be of little value if they were to be enforced only in cases where parties making them had the money with which they might be discharged. No rule is more firmly settled than that parties may make time of the essence of a contract. In this case the parties have so made it, in plain and unambiguous language.

At law the defendant in error has no remedy for a breach of the agreement by reason of his own non-performance. He was not hindered or prevented in the discharge of his obligations by any fraud, accident or mistake; and under such circumstances equity must follow the law. A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident, or mistake has intervened. To relieve from the effect of such stipulations, except on the grounds named, would practically deny the right of parties to make them. Such relief would result in great injustice to vendors. Usually the price of lands in this country is fixed with reference to prompt payment; and where they are an article of commerce, it is often of the last importance to a vendor to receive his money promptly. We have all known men of affluence reduced to penury by neglect in making such payments as they became due. A vendor may require the payments to be made promptly to enable him to meet his own engagements; and for that purpose a stipulation may be inserted in the contract that time shall be of its essence. If courts were to allow a vendee to neglect to make his payments at the stipulated times, where he is not hindered or prevented from so doing by fraud, accident. or mistake, the consequences of his negligence would be visited upon Justice does not require relief from the result of one's own negligence. Courts of equity in such cases refuse to interfere; and leave the parties to their remedies at law, if any they have, for the reason that there is no equity requiring such an interposition.

It was urged in argument that the plaintiff in error might compel the payment of the note of the defendant in error, but if he should do so, an equitable right to a conveyance of the land would then exist which, upon proper application, would be enforced. Equity would not allow the plaintiff in error to collect the residue of the purchase money and hold the land, but until he attempts its collection no such equity arises.

The decree of the court below is reversed, and the cause remanded.

Decree reversed.

BAILEY v. HERVEY.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1883.

[135 Mass. 172.]

Tort, against William H. Hervey and Charles H. Pray, copartners doing business under the firm name of William H. Hervey & Company, for the conversion of certain personal property. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, upon an agreed statement of facts. If, upon these facts, the plaintiff was entitled to maintain his action, judgment was to be entered for him in the sum of \$100 and costs; otherwise, judgment for the defendants.

C. Allen, J. By the terms of the written agreement the plaintiff was bound at all events to pay to the defendants the full amount at which the goods were valued, and upon such payment the title was to vest in him. This payment, therefore, constitutes the agreed price of the goods, and it is a misnomer to call it rent. The defendants would have no right to exact payment in full of the money, and also to reclaim the goods. When the plaintiff discontinued his payments on account, what was the legal position of the defendants? If it be assumed that they might, at their option, either reclaim the goods as their own property, without any obligation to account for their proceeds or value to the plaintiff, or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaimed their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby affirm it as a sale. Two inconsistent courses being open to them, they must elect which they would pursue; and, electing one, they are debarred from the other. Reclaiming the goods would show an election to forego the right to recover the price. But, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, entered their action in court, and he was defaulted. They were thereupon entitled to judgment against him. Under this state of things, the action was continued to a later term

of court, and after the lapse of several months, and after the commencement of the second subsequent term of court, the defendants, without discontinuing their action, or giving any notice to Bailey of an intention to abandon that remedy, took possession of the goods; and, after this had been done, they proceeded in their action to judgment, and took out execution, upon which they collected a small sum from the trustee. They had thus made a decisive election to treat the transaction as a sale, before reclaiming the goods; and, under such an election, the title passed to Bailey. Butler v. Hildreth, 5 Met. 49; Arnold v. Richmond Iron Works, 1 Gray, 434, 440; Heryford v. Davis, 102 U. S. 235, 246.

For these reasons, a majority of the court is of opinion that there must be

Judgment for the plaintiff.¹

SAWYER v. PRINGLE.

* CHANCERY DIVISION, ONTARIO, 1890.

[20 Ontario, 111.]

This action was brought by the members of the firm of L. D. Sawyer & Co., formerly carrying on business as manufacturers of agricultural instruments, against Alva N. Pringle, a thresherman and farmer, to recover the balance due in respect of certain promissory notes given by him for the purchase money of a traction engine and separator sold to him by the plaintiffs, under and in pursuance of a written agreement dated April 25, 1888.

The price under the agreement was to be \$1,600, secured by promissory notes, which were to be signed and sent to the plaintiffs within ten days after the machines were started, and were the notes now being sued on.

The agreement contained a clause, whereby it was provided that the property in the machines should not pass to the defendant till payment in full, and that the plaintiffs might resume possession on default of

¹ Parke Co. v. White River Co., 101 Cal. 37; Crompton v. Beach, 62 Conn. 25; Smith v. Gilmore, 7 D. C. App. 192; Richards v. Schreiber, 98 Iowa, 442; Button v. Trader, 75 Mich. 295; Alden v. Dyer, 92 Minn. 134, accord. Jones v. Snider, 99 Ga. 276; Dederick v. Wolfe, 68 Miss. 500; Campbell Press Co. v. Rockaway Pub. Co., 56 N. J. L. 676, contra. — Ed.

payment when the whole payment should become due, and also on other good cause, and other provisions not necessary to be mentioned here.

Default having occurred in payment of the first of the notes, the plaintiffs resumed possession of the machines, and sold them at auction, realizing \$1,027.80 at such sale.

The plaintiff now claimed the balance alleged to be due on the notes after giving credit for this sum.

ARMOUR, C. J. There is no permission in this order that the plaintiffs may, after resuming possession, sell the machine and recover from the defendant the difference between the price of the machine and the price at which it was sold after they resumed possession of it.

The plaintiffs by resuming possession and afterwards selling the machine disentitled themselves to sue either upon the order or upon the notes mentioned therein: Lamond v. Davall, 9 Q. B. 1030; Hine v. Roberts, 48 Conn. 267; Loomis v. Bragg, 50 Conn. 228; Third National Bank v. Armstrong, 25 Minn. 530; Minneapolis Harvester Works v. Hally, 27 Minn. 495.

In my opinion the action must be dismissed with costs.

TANNER & DELANEY ENGINE CO. v. HALL.

SUPREME COURT, ALABAMA, 1889.

[89 Ala. 678.]

STONE, C. J. The notes sued on were given as purchase-money for an engine, mill and fixtures, which were delivered to the purchasers. In the body of the notes, it was "agreed that the ownership and title of the said machinery remains in said Tanner & DeLaney Engine Company until this note is paid." Plaintiff sued out an attachment against Hall & Mobley, the apparent makers of the notes, and had it levied on the engine, mill and machinery, as the property of Hall & Mobley. This was in the State of Florida, where the machinery was situated. Under this proceeding, the property was sold, and the plaintiff became the purchaser at something less than five hundred dollars. There was proof tending to show that the engine and machinery were worth more than they sold for, and the plaintiff subsequently sold them at a price considerably above the sum for which he purchased them at the attachment sale. The main question of contest in this case is, whether the makers of the notes are entitled to a credit for the increased price obtained by plaintiff, in the re-sale of the engine, mill and fixtures.

The retention of title by the seller is a clause of the contract inserted for his benefit. It is, at most, a form of security for the payment of the purchase-money. It is not absolute ownership; for payment of the debt, or tender within a reasonable time, kept good, would devest the seller's title. So far as the rights of the purchasers were concerned, they were the owners of the property, subject only to the right and option of the seller to assert his reserved title, and the security it afforded. He alone could assert this, and he had the equal right to waive it, and treat his claim as an ordinary debt of the purchasers. And in the exercise of this option, he was entirely independent of any control or wish the purchasers could assert or make known. — Woolridge v. Holmes, 78 Ala. 568, and authorities collated; Summer v. Wood, 77 Ala. 139.

The attachment in Florida, and sale under it, were an election to treat the property as belonging to the purchasers, and not to assert the title and lien reserved in the seller. If a stranger had purchased at that sale, there can be no question that he would have acquired a good title, and the Tanner & DeLaney Engine Company would have been estopped from asserting its lien, or reserved ownership. The plaintiff had an equal right to purchase, and acquired an equally good title by its purchase. The defendant was not entitled to the increase of price realized on the re-sale, any more than he would have been required to suffer the loss, if the property had been destroyed subsequent to the sale, or could not have been re-sold except at a loss. This rule, however, applies only to personal property, the title to which may pass without writing. A different rule obtains when title to real estate is retained as security. Powell v. Williams, 14 Ala. 476.

Several charges of the court are in conflict with the views expressed above.

Reversed and remanded.

BRIDGFORD v. CROCKER.

COURT OF APPEALS, NEW YORK, 1875.

[60 N. Y. 627.]

This was an action, among other things, upon a check drawn by defendants' firm, and transferred to plaintiff by the payee, upon a contract for the sale, by the former, to Gavin & Kelly, of 500 head of cattle. The check was given to Gavin to purchase cattle for defendants. The trial court held that, under the circumstances, plaintiff could not recover, unless, upon proof, that defendants assented to the use made of the check; and submitted this question to the jury. The court here held, that the evidence was sufficient to warrant such submission.

Gavin & Kelly received all of the cattle, except 126 head; they paid plaintiff, including the check, more than sufficient to pay for the cattle delivered. Plaintiff claimed damages for the refusal to receive the residue, and the court held they were entitled, as damages, to the difference between the market-value, at the time Gavin was to receive them, and the contract-price. It appeared that plaintiff, after holding them until spring, sold them at an enhanced price. Defendants claimed the benefit of the sale. Held, that the ruling of the court was correct; that plaintiff had the election either to tender the cattle and recover the contract-price, or to keep the cattle as his own, and recover his damages, to be determined in accordance with the rulings of the court (Dustan v. Andrews, 10 Bosw. 130, questioned); and that it mattered not, and could not be taken into consideration what plaintiff received upon a subsequent sale of the cattle; if the cattle rose in the market, after the failure to perform, the plaintiff, not the defendants, was entitled to the benefit of the enhanced value. 1

¹ See also Warren v. Buckminster, 24 N. H. 336; Strickland v. McCulloch, 8 N. S. Wales, 324. — ED.

DUKE v. SHACKLEFORD.

SUPREME COURT, MISSISSIPPI, 1879.

[56 Miss. 552.]

ERROR to the Circuit Court of Yalobusha County.

Hon. J. W. C. WATSON, Judge.

On December 7, 1876, W. C. Shackleford sold to Mary C. Dellahite an engine, boiler, saw, and gearing, for \$725, of which \$500 was paid cash, and for the balance the following note given:

"\$225. On or before the 1st day of January, 1878, I promise to pay W. C. Shackleford, or bearer, two hundred and twenty-five dollars, bearing 10 per cent interest after maturity; being balance due on engine, boiler, cut-off saw, and gearing sold me this day by the said W. C. Shackleford; title to said machinery being retained by the said Shackleford until the amount is paid in full.

"It is expressly understood that said machinery is to be moved and put up near Garner's Station, on the M. & T. R. R.

"MARY C. DELLAHITE.

"Coffeeville, Miss., Decr. 7, 1876."

The machinery was put up at Garner's Station. The note was not paid at maturity; and Shackleford, without tendering the \$500, brought replevin for the property. The land on which the saw-mill stood was sold to the Dukes before the suit was brought, who purchased with notice of Shackleford's rights, and so the suit was against them; and they bring up the case from a judgment for the recovery of the machinery.

CHALMERS, J., delivered the opinion of the court.

By the terms of the written contract, the title of the property remained in the vendor until payment in full of the note given for the deferred payment. The effect of the contract, therefore, was to leave the right of property in the seller, and to give the right of possession. until default made in payment, to the purchaser. Coupled with this right of possession was also the right in the purchaser to obtain title by payment of the price. But the period of payment having arrived, and default having been made, his right of possession terminated, and the vendor, who had all the while remained owner, became entitled to reclaim the custody of his property. In order to assert this right, it was only necessary for him to make demand for the restoration of the property or payment of the price; and this he did. It was not necessary that he should pay back, or tender, the money received as the This is only necessary in cases of disaffirmance and cash payment. rescission of a sale on condition subsequent. But this was a sale on condition precedent; that is, there was to be no sale, properly so called,

no change of title, until the full price should be paid; and the law annexes to such a sale a right in the seller to recover possession of his property upon default made, even against subsequent bona fide purchasers for value without notice. In reclaiming his property, therefore, the seller is not rescinding the contract, but is enforcing it; and hence there is no obligation to tender back anything. He is simply asserting his legal rights, in strict accordance with the express stipulations of the contract. What rights, if any, the vendee in such a contract might have in a court of chancery is not before us. Ketchum & Cummings v. Brennan, 53 Miss. 597; Story on Sales (3d ed.), sect. 313, and note 2; Benj. on Sales (Perkins's ed.), sect. 320, and note; Baker v. Hall, 15 Ind. 277; Dunbar v. Rawles, 18 Ind. 225; Sumner v. Mc-Farlan, 15 Kan. 600; Zoutchman v. Roberts, 109 Mass. 53; Sage v. Sleutz, 23 Ohio, 1; Little v. Paige, 44 Mo. 412; Duncan v. Stone, 45 Vt. 118; Davis v. Emery, 11 N. H. 230; Bauendahl v. Horr, 7 Blatchf. 548; West v. Bolton, 4 Vt. 558.

The cases specially cited are all cases where partial payments had been made.

In the opinion in Ketchum & Cummings v. Brennan, 53 Miss. 596-609, it was said that in a case like this there must be a precedent rescission, and tender back of the money received. In that case there had been such tender, and the question was, whether it was necessary to bring the money into court, so as to make it a continuous tender. It was properly answered in the negative. Our attention was not called to the question whether any tender at all was necessary, and we were misled by the concession on both sides that it was; and to some extent also, by the broadness of the statement made by Judge Story, in his work on Sales, sect. 457 a, that in conditional sales the vendor caunot recover his property, upon failure of the vendee to perform the condition, "until he had made demand for the performance of the condition, and rescinded the contract." Of course, in order to rescind the contract he must tender back what he has received; but the language is applicable only to sales on conditions subsequent, and not to those where, by the terms of the contract, no title is to pass until the performance of the condition. The agreement of the parties shows that the property, as between them, was to remain personalty, though annexed to the freehold. Affirmed\

See generally Williston's Cases on Sales (2d edition), pp. 517-563. — ED.

CHAPTER III.

THE ELEMENTS OF THE MORTGAGE.

SECTION I. - THE SECURITY.

A. Extent of the Lien.

SEABOURNE v. POWELL, AUSTIN AND MACKLEY.

CHANCERY, 1686.

[2 Vern. 11.]

Thomas Cowls demises houses and grounds in Chick-lane, in 1674, for a long term to build upon; which term came by assignment to the defendant Austin and her husband, which they believed to be a good title, and borrowed £100 of the defendant Mackley's wife, upon a mortgage of it, for which the plaintiffs became bound. That the defendant Austin's husband nine years since ran away for debt, and they thinking their title good, had borrowed, and built upon the ground with it, and but £15 of Kerrington's money was that way employed. Seven years after her husband's going away, the defendant Austin found her title not good, the real title being in one Haynes; and he compassionating her case, for ten guineas fine, leased the premises for a long term, at four pounds yearly rent, in trust for her to the defendant Powell et al, and she had instigated Mackley to sue the plaintiff upon the bond for the mortgage-money.

The plaintiff's bill was, that though the mortgage might not in strictness of law be good, yet the estate granted by Haynes was, in regard of the moneys laid out in building upon the other title, and that the estate mortgaged was of better value than the mortgage, besides what was reserved to be paid to Haynes; and that the mortgagee had therefore a plain equity, to have the benefit of that title, which was but a graft into that stock from which he derived; and that the defendant Alice had since the taking of that estate (and so it appeared on proof) paid the interest to the mortgagee; and that therefore the plaintiffs being but sureties in the bond had an equity to have the benefit of the mortgage, and of that new acquired title, to save them harmless against

the bond; or else the trustees ought to be decreed to make a new mortgage to the mortgagee; and he to forbear suing upon the bond.

THE MASTER OF THE ROLLS in this case, did look upon the estate made by Haynes to be as a graft into the old stock, and the benefit of it above £4 per annum reserved to Haynes did arise in consideration of the former title; and therefore did decree the trustees to make a new mortgage to the mortgagee.

LEIGH v. BURNETT.

CHANCERY, 1885.

[29 Ch. D. 231.]

On the 10th of November, 1863, the equity of redemption of a leasehold house in South Street, Chichester, was assigned to W. H. Newman. The lease was then subject to a mortgage, which afterwards became vested in R. Ingram and C. E. Dawkins, two of the defendants to this action. The lease had been granted on the 2d of May, 1853, by the Dean and Chapter of Chichester, in consideration of the surrender of a former lease and of the payment of a fine, to William Skelton, for the term of thirty years from the 29th of September, 1851. It had been the custom of the Dean and Chapter to renew the leases of their property, but the lease contained no covenant for renewal. The reversion in fee became afterwards vested in the Ecclesiastical Commissioners. who would not renew the lease. In the year 1880 Newman was negotiating with the Commissioners for the purchase of the reversion in fee, and on the 20th of October, 1880, he borrowed £300 from the plaintiff Jessie Emma Leigh, the wife of the plaintiff Thomas Leigh, giving her a memorandum in writing which stated that the £300 was to be secured by a mortgage from him to her of the house in South Street, so soon as he had completed "the enfranchisement of the said property from the Ecclesiastical Commissioners," and that, meanwhile, he had deposited in her hands his title-deeds of some property at Lyndhurst. Leigh, when she advanced the £300, had no notice of the mortgage of the leasehold interest to the defendants Ingram and Dawkins. Newman afterwards concluded an agreement with the Commissioners for the purchase of the reversion, but the conveyance to him was not executed until December, 1881.

On the 25th of January, 1882, Newman was adjudicated a bankrupt. The plaintiffs claimed a declaration that they were entitled to an equitable charge for the £300 on the house in South Street, and that the mortgage might be enforced by foreclosure or sale. The defendant Burnett was the trustee in bankruptcy of Newman.

Pearson, J. Newman entered in the negotiation with the Ecclesiastical Commissioners as being the de facto lessee of the property, and, while the negotiation was in progress, he borrowed £300 from the plaintiff, and gave her a charge for it on the property, which was to be conveyed to her so soon as the negotiation with the Commissioners should be completed. In December, 1881, it was completed, and the property was conveyed to him in fee simple by the Commissioners, and he paid the purchase-money for it. The question is, what is the position of the plaintiff under her memorandum of charge as regards the prior mortgagees of the lease? Is the plaintiff entitled, not to priority over those mortgagees, but to the benefit of a charge in respect of the amount which Newman paid for the purchase of the reversion. It has been argued that, as Newman was not the original mortgagor of the lease, and was under no obligation to renew the lease or to purchase the reversion, he was entitled as against the mortgagees of the lease to a lien on the property for the purchase-money, and that what he mortgaged to the plaintiff was any interest which he might have in the property when he should have completed the purchase of it, and that, consequently, that lien passed to the plaintiff, and the mortgagees of the lease are not entitled to the benefit of the purchase without satisfying the lien. To my mind there is a grievous fallacy in this argument. , I can only treat Newman as a mortgagor of the lease, and in that character he could hold the reversion only on the same terms as he would have held a renewed lease of the property. The doctrine of this court has always been that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage. The case of Rakestraw v. Brewer is an illustration of this doctrine. There the mortgagee of a renewable term procured from the original landlord a new term to commence from the expiration of the old one, and it was held that the new term was subject to the old equity of redemption. If Newman himself were here he would be entitled to redeem the reversion on paying off the mortgages, but he would not be entitled to say to the mortgagees of the lease, I bought the property for your benefit, and you can only have it on paying me the purchase-money which I gave for it. I cannot understand how any one who claims through Newman can be in any better position than he would have been. It is impossible for the plaintiff to say that, in respect of the purchase-money paid by Newman, she is entitled to priority over the mortgagees of the lease. I can conceive that she might be able to establish such a claim if she had advanced the money to buy the reversion, but that would be because she had no interest in the property through Newman, but was giving up a purchase on the terms of being repaid what she had given for it. As it is, she has only a derivative title through Newman, and he could not have maintained such a claim against the mortgagees of the lease.

EX PARTE SAMUEL BISDEE.

BANKRUPTCY, 1840.

[1 M. D. & De G. 333.]

This was the petition of an equitable mortgagee, for a sale of the property comprised in his security, and for leave to prove for the deficiency. The bankrupt, in August, 1831, borrowed of the petitioner and one Mr. W. Bisdee, £1,300; and, as a security, gave them a bond, and deposited with them certain deeds mentioned in a schedule annexed to the bond. Some of these deeds related to property called the Steep Holmes, others to two undivided third parts in certain lands in the parishes of Blagdon and Butcombe in the county of Somerset, and another deposited deed was the conveyance to the bankrupt of the equity of redemption in other lands in the parish of Blagdon, subject to two mortgages, one for £50, dated May 15, 1817, and the other for £150, dated April 2, 1812.

Sir J. Cross. With regard to the property in the parish of Blagdon, the bankrupt purchased the estate in fee simple, subject to certain mortgages; and before the mortgages were paid off, he deposited his title-deeds with the petitioner, as a security for money advanced; and afterwards he paid off the mortgages. I am of opinion, that the petitioner is entitled to the full benefit of his security upon the lands, which are comprised in the deposited documents, exonerated (as those lands now are) from the prior encumbrance. With regard to the premises which were taken in lieu of the undivided shares in the estates at Butcombe and Blagdon, and for which the sum of £100 was taken for equality of partition, it seems clear, that the petitioner is entitled to the benefit of his security as to these premises also.

also the factory, then in process o who endeavored to secure himself, burg tannery, with the saw-mill, whould hold the title till paid, ought and shafting in said factory," to sec without some substantial reason. then sets forth the execution by Se understood, when he sold the the petitioner, of another mortgage intended to put the property to machinery, and also sets forth thathe price; and from the kind and & Co., claim an interest in said proc expected that in its use it neces-

PECK, J. The bill having beenty, substantially in the manner in defendants except Henry G. Root apparently parcel of the realty. question is as to the right of the pose and did suppose was to be Shants & Co., to that portion of taken to have consented to, as he Root to the said mortgagors. ing, by implication at least, if not

The bill, and answer of Root, irty might be incorporated with the lation of the parties on file, leaver it was, and they thereby become in the case, and no time need beneident to their record title to the agreed.

was misled and induced to part

It must be regarded as settled property, the equity of the morta party may sell and deliver perso conditional vendor. Justice and it shall remain the property of theuire this limit to the rights of a that under such contract, the title and an innocent purchaser or condition is complied with, both tice, who advances his money on conditional vendee, and also as t

bona fide purchaser without notice perty mentioned in the answer of only question is whether the facts of statement of facts on file, which rule.

ctory at the time of the execution

The proposition of the counselwas in the yard and put in place whole property sold conditionally right of the defendant Root is personal property as well after as That, not having been annexed be claimed as fixtures or as par tgage, would not pass as incident between mortgagor and mortgage not devest Root of his title. It absolute, the defendant's proposity the mortgagors after the exethe recent decisions in this State, see might hold it as against them, factory, as shown in this case, itonal vendor. As to this portion as to pass under a mortgage of thot misled, and advanced nothing remains as between the mortgagee

owner under his conditional saley is reversed, and cause remanded paramount right.

First, as to that portion of the; Root have a right to that portion in the mill and factory by the unot in place in the factory or mill it of Root, and which was in theortgage to the orator, but put in time the orator took his mortgagelection to pay to Root the value it appears, having advanced his mree so far as Root is concerned, faith, without notice of any lien ithin such reasonable time as the its condition, having reason to s purpose.

this property in question was th which it was annexed, and of w to have a strong equity in his f has only a derivative title througf erection on the site of said Sears-maintained such a claim against tater-wheels, and all the machinery

ure a note of \$1,000. The petition
hants & Co., and the purchase by
on the same premises, except the
t the defendants, other than Shants
Ex PARTE SAN perty.

Bankrui taken as confessed as to all the [1 $M.D.g_3$, and he alone defending, the only orator, under his mortgage from

This was the petition of an equite property sold conditionally by property comprised in his securit

deficiency. The bankrupt, in Augn connection with the written stipuand one Mr. W. Bisdee, £1,300; a no dispute as to the material facts and deposited with them certain decepter in repeating the facts thus to the bond. Some of these deeds

Holmes, others to two undivided as a general rule in this State, that parishes of Blagdon and Butcomhal property, under a condition that another deposited deed was the vendor until the price is paid; and equity of redemption in other lane will remain in the vendor until the to two mortgages, one for £50, ϵ as between the vendor and such for £150, dated April 2, 1812. Between the original vendor and a

SIR J. Cross. With regard to throm such conditional vendee. The the bankrupt purchased the establ this case take it out of the general mortgages; and before the mortg;

title-deeds with the petitioner, as ε of the defendant Root is, that the afterwards he paid off the mortgag by Root to Shants & Co. was tioner is entitled to the full benebefore the sale, and cannot properly which are comprised in the deposits of the realty. But we think as lands now are) from the prior ε , if the title of the mortgagor were premises which were taken in licon is not correct; and that under estates at Butcombe and Blagdoon being put in place in the mill and was taken for equality of partition became so far annexed to the realty is entitled to the benefit of his seque real estate. But still the question

under his mortgage, and the original to the mortgagor, which has the

property which had been put in place lortgagors after they thus purchased e building and thus annexed at the 3: As to this property, the orator, as loney and taken his mortgage in good or encumbrance upon it, and from uppose that the mortgagors' title to e same as his title to the realty, to hich it was apparently parcel, seems ayor. While on the other hand the

defendant Root, the unpaid vendor, who endeavored to secure himself, by stipulation in the sale that he should hold the title till paid, ought not to be deprived of this security without some substantial reason. But the defendant Root must have understood, when he sold the property to Shants & Co., that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property, he must have expected that in its use it necessarily must be annexed to the realty, substantially in the manner in which it was, and thereby become apparently parcel of the realty. What he knew or had reason to suppose and did suppose was to be done with the property, he must be taken to have consented to, as he did not object. Root therefore having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shants & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor. Justice and equity, as well as sound policy, require this limit to the rights of a conditional vendor as between him and an innocent purchaser or mortgagee of real estate without notice, who advances his money on the faith of a perfect title.

But as to that portion of the property mentioned in the answer of the defendant Root and in the agreed statement of facts on file, which had not been placed in the mill or factory at the time of the execution of the mortgage to the orator, but was in the yard and put in place in the factory or mill afterwards, the right of the defendant Root is paramount to the right of the orator. That, not having been annexed to the realty at the date of the mortgage, would not pass as incident to the realty; and the mortgage did not devest Root of his title. It having been placed in the building by the mortgagors after the execution of the mortgage, the mortgage might hold it as against them, but not as against Root, the conditional vendor. As to this portion of the property the mortgagee was not misled, and advanced nothing on the faith of it.

The decree of the Court of Chancery is reversed, and cause remanded for a decree of foreclosure for orator against all the defendants as to all the property except that defendant Root have a right to that portion of the property, or the value thereof, not in place in the factory or mill at the time of the execution of the mortgage to the orator, but put in afterwards, — the orator having his election to pay to Root the value of it, or have it excepted in the decree so far as Root is concerned, with liberty to Root to remove it within such reasonable time as the Court of Chancery shall fix for that purpose.

IN RE MARYPORT HEMATITE IRON AND STEEL COMPANY.

CHANCERY, 1891.

[1892, 1 Ch. 415.]

NORTH, J. (after stating the provisions of the contract of the 2d of July, 1889, continued):—

But for the special provisions of this agreement, the property in the machinery would have passed to the purchasers when it was erected. But there is in the agreement a clear and distinct stipulation that. until it has been paid for, the machinery is to remain the property of the yendors. In my opinion, as between the parties to that agreement, there is nothing in law to prevent that stipulation from taking effect. The Maryport Company had previously executed a mortgage of their colliery to the plaintiffs, and the mortgage deed provided that, not only the existing machinery and chattels, but also all the machinery and chattels to be thereafter brought upon the premises, should be included in the security. That, in my opinion, was a perfectly good bargain as between the parties to it. But I think it was not in the power of the mortgagors to confer on their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them. The Maryport Company (the mortgagors) cannot be heard to say that the machinery in question is not the property of the Luhrig Company, and the banking company (their mortgagees) do not stand in any better position. But it was argued that, so soon as the machinery was fixed upon the premises, the property in it vested in the landlord. I am by no means satisfied that it did, or that, so long as he remained a reversioner, he would have any right of action in respect of the machinery. No doubt, if it had remained upon the demised premises at the end of the term, it would have become the property of the owner in fee of the land, subject to this, that the tenant might have had a right to remove it, so long as he continued in possession of the demised property. I am not satisfied that down to the end of the term the landlord would have had any property in the machinery. But, assuming that he would, still the only claim now made adversely to the Luhrig Company is made by persons who derive title not under the landlord but under the tenant. As regards the landlord, all that I have to take care is that he gets his rent accrued since the winding-up commenced. As the receiver is going to abandon the colliery, I think the Luhrig Company are entitled to remove the machinery which they claim. It was more convenient that the motion

and the summonses should be heard together; but there will be two separate orders, one upon the motion and the other upon the two summonses.¹

HOLROYD v. MARSHALL

House of Lords, 1862.

[10 House of Lords, 191.2]

THE LORD CHANCELLOR (LORD WESTBURY), after stating the facts of the case, said: My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is

¹ See Campbell v. Roddy, 44 N. J. Eq. 244. — Ed.

² Everything is omitted except the opinion of Lord Westbury; it sufficiently states the issues. — Ep.

the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract/ is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and

passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.¹

ALBERT B. CHICK, EXECUTOR v. CHARLES H. NUTE, Assignee.

SUPREME COURT, MASSACHUSETTS, 1900.

[176 Mass. 57.]

REPLEVIN of certain personal property, including fixtures. Trial in the Superior Court, before Bishop, J., who reported the case for the determination of this court, in substance as follows.

On August 11, 1887, Nathaniel P. Nutter, who carried on the business of tailoring in Boston, borrowed \$1,000 of Harrison Chick. his uncle, for which he gave a promissory note, having previously, on August 5th, executed to Chick a bill of sale of the stock of goods, fixtures, and other property in his store. On August 12th, Nutter and Chick entered into a written agreement wherein Nutter agreed to buy at his own cost and keep in stock in his store an amount of goods equal in value to the stock then on hand, to pay the running expenses of the business, and, while the note remained unpaid, to keep at all times a stock of not less than \$1,000 in value, with the understanding that all goods bought by him should be the property of Chick. The judge found that the instruments, though bearing different dates, constituted parts of one transaction; that they were never recorded; that no delivery of the property mentioned in the bill of sale was ever made by Nutter to Chick, but that it remained in the possession of Nutter; and that the goods were all made into garments and sold by Nutter in the

¹ Accord: Collyer v. Isaacs, 19 Ch.D. 351; Coombe v. Carter, 36 Ch. 348; Tailby v. Receiver, 13 D. C. 523; Pennock v. Coe, 243 How. 117; Barnard v. Norwich Co., 14 B. R. 469; Floyd v. Morrow, 26 Ala. 344; Apperson v. Moore, 30 Ark. 56; Gregg v. Sandford, 24 Ill. 17; Scharfenberg v. Bishop, 35 Ia. 60; Sawyer v. Long, 86 Me. 543; Brady v. Johnson, 75 Md. 445; Hudson v. McKale, 107 Mich. 22; Ludlum v. Rothschild, 41 Minn. 218; Sellers v. Lester, 48 Miss. 513; Keating v. Hannankamp, 100 Mo. 162; Bank v. Baker, 57 N. J. Eq. 231; Collins Ap., 107 Pa. 590; Williams v. Winsor, 12 R. I. 9; Parker v. Jacobs, 14 S. C. 112; Tedford v. Wilson, 3 Head, 311; Braxton v. Bell, 92 Va. 229; Peabody v. Landon, 61 Vt. 318. — ED.

regular course of his business, and other goods were bought by Nutter in his own name to place and keep in his store, and these again were made into garments and sold to customers, and so on; so that at the time of the assignment hereinafter mentioned the goods which Nutter had in the store were not the same as those covered by and described in the bill of sale. The fixtures were the same. On October 23, 1896, Nutter executed to the defendant a common-law assignment of all his property, including the stock of goods, fixtures, &c., then in the store, for the benefit of his creditors.

The judge ruled that no claim was established in favor of the plaintiff in the property replevied except in the fixtures, and as to all other property found for the defendant, and ordered a return to the defendant with damages, but found for the plaintiff in replevin for the fixtures.

If the rulings and findings or either of them were erroneous they were to be set aside, reversed, or modified, and such order entered as the court should determine; otherwise judgment was to be entered upon the findings.

Holmes, C. J. The bill of sale is shown to have been a mortgage by the agreement made as part of the same transaction. It is plain that if Nutter paid his note Chick was not to keep the goods. The only goods embraced by the instrument which were owned by Nutter at the time, and which are still on hand, are the fixtures. The rest is after acquired property. The instruments were not recorded, and possession was not taken by Chick of any part of the property before the assignment to the defendant and possession taken by him.

The old notion with regard to conveyances or mortgages of after acquired property was that they were simply void. Now such instruments are recognized as contracts, which on the acquisition of the property may operate as conveyances if they sufficiently identify the thing conveyed, and if other necessary conditions are satisfied. Blanchard v. Cooke, 144 Mass. 207, 225, 227. The other necessary condition, if they are not recorded, is that possession must be taken before other rights intervene. In this case we need not consider whether such an instrument could be recorded effectively after the chattels to which it applies have been acquired and the instrument begins to operate as a mortgage properly so called. It is settled that recording at an earlier date is not notice, and it may be that recording at the later moment would be equally ineffectual. We express no opinion upon that. If it be true, then the only way in which the mortgagee can make his mortgage valid as against others than the mortgagor is by taking possession. The policy of the law is not to be evaded. In this case he neither recorded nor took possession.

The defendant was not a party to the mortgage. Bingham v. Jordan, 1 Allen, 373. It follows that the mortgage was not valid against him even as to the after acquired stock of goods, and, a fortiori, as to the fixtures. Probably the ruling of the Superior Court was based on Wilson v. Esten, 14 R. I. 621, which construed the assignment as pur-

porting to be subject to the mortgage. We could not adopt a similar construction in the assignment before us. It specifies the goods.

Of course the plaintiff could not sustain his action of replevin on his right as creditor to avoid the conveyance to the defendant. That right he could assert by an attachment, but not by a naked election to declare the conveyance void in the interest of the earlier conveyance to himself, which the law postpones to the defendant's title. The same principle which makes the conveyance and delivery to the defendant good as against the mortgage at the moment when they were made keeps them good as against it. The fact that the later conveyance would give way to a still later attachment does not interfere with its priority over the mortgage.

Judgment for the defendant.1

C. Intervening Claims.

FUNK v. MERCANTILE TRUST CO.

SUPREME COURT, IOWA, 1893.

[89 Ia. 264.2]

ROBINSON, C. J. In the year 1889 the Crescent Coal Company executed to the intervenor a mortgage to secure the payment of one hundred thousand dollars in bonds. The property so mortgaged included lands in Keokuk County, the coal in the land, together with the right to mine and remove it, the towers, hoisting and pumping machinery and other appurtenances of the mines in the mortgaged premises, and personal property used in connection with the mines. The mortgage also included all right and title of the coal company "to all money and credits due, or to become due to it, and all the contracts and agreements made or to be made, and all and singular any property that may be acquired in the future by the party of the first part, and all and singular the entire property of the party of the first part, both real and personal, wherever found, together with the rights, privileges and appurtenances belonging or in any wise appertaining to the said land and coal, . . . together with all its corporate rights, privileges, immunities and franchises now held or hereafter to be acquired, with the reversion and reversions, remainder and remainders, income and royalties, rents, issues, and profits thereof, and all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, present or in future, of the party of the first part of, in, and to, all and singular the property and effects hereinbefore described, and every part of the same, and every parcel thereof,

¹ Accord: Loth v. McCarthy, 85 Ky. 591; Chase v. Denny, 130 Mass. 566;
Rochester Co. v. Rasey, 142 N. Y. 570; Transit Co. v. Ryan, 54 Ohio St. 307; Phelps v. Murray, 2 Tenn. Ch. 746; Merchants' Bank v. Lovejoy, 84 Wis. 601. — Ed.
2 Only one point is printed.

with the appurtenances, and all revenues, benefits and advantages and profits to the party of the first part at any time accruing from or out of the same, or the business operations thereof, to have and to hold the same," &c. The mortgage also provided for the taking possession of the mortgaged property. On the twenty-fifth day of March, 1891. the intervenor obtained in the District Court of Keokuk County a decree for one hundred and seven thousand and fourteen dollars and thirty-seven cents, due on the bonds, foreclosing the mortgage, and ordering the sale of the mortgaged property. The decree followed the mortgage in all respects, and gave to the intervenor the right to the possession of all the mortgaged property until the amount adjudged to he due should be paid, or until the right of possession should pass to a purchaser. On the twentieth day of April, 1891, an execution was issued, under which so much of the mortgaged property as could be found was sold. The execution was returned August 1, 1891, satisfied only in part, more than sixty thousand dollars remaining unpaid. On the fifteenth day of April, 1891, a judgment was rendered by the District Court of Keokuk County in favor of the plaintiff, and against the coal company, for the sum of one thousand and thirty-three dollars and thirty-seven cents and costs. On the eighteenth day of the same month an execution was issued on the judgment so obtained, under which the Chicago & Northwestern Railway Company and the Burlington, Cedar Rapids & Northern Railway Company were garnished, and the plaintiffs claim that by means of that garnishment they became entitled to the payment of their judgment from the money owed by the garnishees to the defendant. It appears that the money so owed was due for coal which the coal company had mined from the mortgaged land, and furnished to the garnishees, between the thirtyfirst day of March and the nineteenth day of April, 1891. intervenor contends that the money owed by the garnishees was income, issues and profits accruing from and out of the mortgaged property, and from the business operations of the company, and was included in the mortgage, and that the plaintiffs, their attorneys, and the sheriff had actual notice of the mortgage on the money in the hands of the garnishees before they were garnished. The plaintiffs admit that they and their attorneys and the sheriff knew the contents of the mortgage, but deny that they had actual notice of the mortgage on the debts in question at the time of the garnishment.

It is claimed by the appellees that the mortgage did not include such debts, for the reason that the description is not sufficiently specific and definite. In Sandwich Manufacturing Co. v. Robinson, 83 Iowa, 567, 568, it was held that a valid mortgage on a claim for money not earned, as on accounts for work to be done, may be given. We know of no reason why such a mortgage may not also be given upon the income, issues and profits of the business of mining and selling coal, and upon accounts which may accrue from it. It may be true that the description in the mortgage in question is too indefinite and uncertain,

as to some of the property and property rights sought to be included, to be effectual; but, if that be so, it would not affect the right of intervenor to any property sufficiently described. The debts which the garnishee owed the defendant were for coal on which intervenor had a mortgage, and were income and issues of the defendant which accrued from its business operations. The plaintiffs knew the contents of the mortgage, and must be charged with knowledge of the fact which the relation of the garnishees with the defendant necessarily suggested, and which an inquiry would have disclosed with certainty, that the debts garnished grew out of the business of the defendant, and were included in the mortgage. We conclude that the mortgage was valid as against the plaintiffs.¹

HANNIBAL HAMLIN AND OTHER TRUSTEES v. EUROPEAN AND NORTH AMERICAN RAILWAY CO. AND OTHERS.

SUPREME COURT OF MAINE, 1881.

[72 Me. 83.]

BILLS IN EQUITY, heard upon bills, answers and proofs.

The first is a bill brought by the trustees of the bondholders of the European and North American Railway Company against the company, and certain creditors (E. R. Burpee, F. A. Wilson and James W. Emery) of the consolidated company, who had levied upon lands of the company, purchased or contracted for subsequent to the mortgage to the trustees, and called the Crosby lot in Hampden, and the Hinckley lot, Lord lot, and Lord and Veazie lot in Bangor, to restrain the defendants from disputing the title and possession of the trustees to such lots, &c.

SYMONDS, J. The three parcels of real estate in Bangor referred to as the Hinckley, Lord, and Lord and Veazie lots, the European and North American Railway Company, in the fall of 1870, contracted in writing to purchase. Possession was then taken by the corporation, and has been retained by those in charge of the railroad from that time to the present. The payments required by the contracts were made by that company, and afterwards by the consolidated company, and by the trustees under each mortgage during the period of their possession.

¹ See 19 HARVARD LAW REVIEW, p. 562, note 4. - Ed.

The premises have been used and improved at considerable expense for depot-grounds; the principal improvements having been made before consolidation.

The course of reasoning employed in the previous case, Hamlin et al. Trustees v. Jerrard, leads directly to the conclusion, that the mortgage to the complainants in the first of these bills in equity, as trustees. operated upon the inchoate right of the Maine company to a conveyance of these lots under the contracts, as soon as they were executed and that company was in possession under them for the purposes of the charter. Their right to a conveyance became at once subject in equity to the mortgage. The mortgagees, upon possession taken, were subrogated to the rights of the mortgagors. By our statute such a right to the conveyance of lands may be taken and sold on execution. Rev. Stat. c. 76, § 29. Such a mortgage may apply to it as well. At the date of a mortgage like this, given to obtain funds to complete construction, the corporation might be in possession of considerable portions of its road-bed under similar contracts to purchase; or it might subsequently acquire title to parts of its line in that way, instead of pursuing the statutory method. In either case, such after-acquired property, when in pursuance and upon performance of the contract the full title to it vests in the corporation, becomes part of a mortgaged estate. Any intermediate interest or right gained, is equally subject to the mortgage. The manner of acquiring the right of way, or depotgrounds, cannot be important. It is upon the right acquired that the mortgage acts. Possession of lands under such circumstances and for such purposes, with the right on certain terms to perfect the title, may be as valuable an incident to the railroad itself, as necessary a part of it, as any leasehold interest or higher estate it may have in another part of its line. See Barnard v. Norwich and Worcester Railroad. supra, where an after-acquired leasehold interest was held to pass to the trustees under the mortgage.

Nor do we think a different rule applies, as to the payments made by the consolidated company upon these contracts during the period of its possession. Such payments stand upon the same footing as improvements made by that company upon the buildings and grounds. Its position, in reference to the plaintiffs as trustees and to the mortgaged property, is in some respects more truly defined by saving that it is its predecessor in title under a new name (and something more), than by regarding it merely as the assignee of the original company. It took the entire property, subject to encumbrances, and assuming the debts. Five millions of the consolidated bonds were to be used only to redeem and pay the first mortgage claims. If the exchange of bonds had been completed, the whole consolidated property, with all future additions, would still have been encumbered by substantially the same debt as that secured by the plaintiffs' mortgage, under a new form, and in its own name. If, at the date of consolidation, the Maine company had obtained a clear title to the depot grounds in Bangor, but

was in debt for them, had received the deed, but had not paid the purchase-money, it is clear that the grounds would have been subject to the plaintiffs' mortgage, while the debt would have been one the consolidated company must pay. Or, if there had been a mortgage on the same real estate when the Maine company received its deed, supposing for the sake of illustration the deed to have been delivered and under such circumstances, and consolidated funds had paid it, the payment would have been of a debt it was the duty of that company to pay, that mortgage would have been discharged, and the plaintiffs' mortgage would have become the first encumbrance upon the land. The mortgage to the plaintiffs attached to the right to a deed of the stationgrounds as a part of the road itself, and it continued to attach to it as the right grew in value. The consolidated company, under the articles of union, was not an assignee of these contracts, discharged from the mortgage. The increased value of the right to a conveyance of real estate, which was in the occupation of the company and essential to the road, remained subject to the mortgage as an accession to the road, just as the increase of values along any part of the line, arising from improvements made by the consolidated company in its road-bed, track, or stations, added to the security of the first mortgage bondholders. If the consolidated company, taking the entire property of its predecessor in Maine, subject to mortgage, increased the value of the railroad, and the rights that go with it, by making payments or expending money, that gives it no equitable interest as against the mortgagees. If, at the consolidation, the title of the Maine company to a part of its road-way or yards was imperfect, and payments by the consolidated company perfected it, the mortgage holds the completed title. gard to these three contracts for the real estate at the station in Bangor, it should be observed, also, that the interest in them which passed to the consolidated company at the consolidation, not only was subject to the mortgage in the sense already indicated, but it was also in its essence, a right, and nothing more, to acquire a thing, which, when acquired, as to these plaintiffs, was a part of the road mortgaged to them.

It is not doubted that an interest in these contracts passed to the consolidated company by the terms of the articles of union. It would be to that company that the conveyances should be made, when the terms were fulfilled on which the contractors were obliged to give the deeds, unless a legal foreclosure of the plaintiffs' mortgage had changed their interest as mortgagees into an absolute title. But a conveyance to the consolidated company, prior to foreclosure, would inure to the benefit of the plaintiffs, to the extent of their mortgage.

The complainants in the first bill are entitled to an injunction against all the respondents named therein and in the amendment, restraining them from any interference with the complainants' possession and control, as mortgagees, of the real estate therein described, and from any resistance of the complainants' title to the same to the extent of the trusts declared in the mortgage; the injunction to be made perpetual

and without the limitation just stated, if the interest and title of the complainants has or shall become absolute by a legal foreclosure. The second bill is dismissed.

Decree accordingly.

FOSDICK v. SCHALL.

SUPREME COURT, UNITED STATES, 1878.

[99 United States, 235.1]

Schall leased cars to the Chicago, Danville, and Vincennes Railroad. Subsequently Fosdick and Fish, as trustees of a mortgage of the railroad to secure bonds, filed a bill for foreclosure of the mortgage. A receiver was appointed and the road operated for some time. During this time Schall was paid an agreed rental by the receiver under direction of the court. The railroad was subsequently sold under decree of court and the cars returned to Schall. He then filed a petition praying that he be paid rental for a period prior to the appointment of the receiver, during which he had not been paid any rental. The Circuit Court for the Northern District of Illinois allowed this claim, directing the payment of \$14,568.75 to Schall. It did not appear from the record that there were any funds in court to the credit of the cause except such as arose from the sale of the mortgaged property. Fosdick and Fish and certain bondholders appealed from this order.

MR. CHIEF JUSTICE WAITE. We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court in the exercise of a sound judicial discretion may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgagees and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed

 $^{^{1}}$ The statement of facts has been rewritten, and only a part of the opinion has been printed. — ED.

will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. Galveston Railroad v. Cowdrey, 11 Wall. 459; Gilman et al. v. Illinois & Mississippi Telegraph Co., 91 U. S. 603; American Bridge Co. v. Heidelbach, 94 id. 798.

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the Chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is

appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken. from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction

on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States; and it is not contended that the intervenor has brought himself within the rule fixed by the State court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the State court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. Prima facie that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.1

¹ Compare: Huidekoper v. Locomotive Works, 99 U. S. 258; Hale v. Frost, 99 U. S. 389; Miltenberger v. Railway Co., 106 U. S. 286; Trust Co. v. Souther, 107 U. S. 591; Burnham v. Bowen, 111 U. S. 776; Union Trust Co. v. Illinois Railway Co., 117 U. S. 434; Union Trust Co. v. Manning, 125 U. S. 591; St. Louis, &c. Railroad v. Cleveland, &c. Railway, 125 U. S. 658; Kneeland v. American L. & T. Co., 136 U. S. 89; Railroad Co. v. Wilson, 138 U. S. 501; Thomas v. Western Car Co., 149 U. S. 95; Virginia, &c. Coal Co. v. Central Railroad Co., 170 U. S. 355; Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257; International Trust Co. v. T. B. Townsend Co., 95 Fed. Rep. 850 (C. C. A.); First Nat. Bank v. Ewing, 103 Fed. Rep. 168.—SMITH: CASES ON CORPORATIONS, 1197 n.

THE INDOMITABLE

THE INDOMITABLE.

ADMIRALTY, 1859.

[Swabey, 446.]

This was a cause of bottomry, opposed by the mortgagee of the

ship in possession.

On the 1st of April Dr. Lushington gave judgment as follows:—I have delayed my judgment in this cause solely from a wish that the party against whom the judgment will be given should be satisfied that mature consideration had been given to the case. From the time I perused the papers I had no doubt upon the material question of fact on which the decision of the court will turn. The principles upon which the court must proceed are acknowledged upon all hands; and the application of those principles to the facts of the case appeared and do appear to me equally clear.

There is one rule established by all authorities: that this court has no jurisdiction to enforce any bond or obligation entered into by the master of a vessel unless it be a bottomry bond, of which maritime risk is an ingredient essential to its vitality.

On the 11th of October, 1858, an action of bottomry was entered against this ship on behalf of Messrs. Binny & Co., of Madras, and an appearance was given by the mortgagees in possession.

The history of the ship is as follows: — She was originally the property of the Australian Auxiliary Steam Clipper Company; but on the 15th of August, 1857, was mortgaged to the present mortgagecs in possession. On the 12th of September, 1857, she sailed for Madras with troops and a cargo. On her outward voyage the master, at the Cape de Verd Islands, purchased fuel to the amount of £471, for which he drew a bill upon his owners. This bill was dishonored and forwarded to Messrs. Parry & Co., of Madras, for realization. On the 23d of February, 1858, the vessel reached Madras, when payment of the dishonored bill was demanded of the master, and legal proceedings It is not necessary for me to recite in detail the proceedings at Madras, nor the circumstances attendant upon the dealing with the outward freight. They might be very material if the court was in a position to entertain the consideration of them. I shall advert only to what I deem pertinent to my decision. The master, being without money or credit (I assume these averments to be true), applied to Messrs. Binny & Co. for an advance of money to pay the dishonored bill and to enable him to commence a fresh voyage. I assume, again, that the master was so circumstanced (though I give no opinion upon it), that he might have granted a valid bottomry bond. Messrs. Binny & Co. advanced 14,710 rupees to pay off the bill and to cover the disbursements of the ship at Madras and the outfit for a voyage to Calcutta; and they did so under an agreement which is alleged to be a

bottomry bond. And here, though I do not mean to rely upon the fact as guiding my judgment, I deem it right to observe that this ship was peculiarly circumstanced; she was, and the fact must have been known to the master, mortgaged at the time she left England.

I now come to the consideration of the agreement which is said to be a bottomry bond, capable of being enforced in this court. This agreement is dated 22d of March, 1858, and appears to be an agreement between the master and Messrs. Binny & Co. It begins by reciting all the facts I have already mentioned, including the advance of money by Messrs. Binny & Co., and then states stipulations, or, as they are called, conditions, to be performed on the part of the master. 1st. That the vessel shall be consigned to Messrs. Jardine & Co., of Calcutta. 2d. That the master shall draw a bill upon them in favor of Binny & Co. for 15,000 rupees, payable at thirty days' sight. That the master shall repay to Messrs. Binney & Co., or their agents, all such moneys paid or disbursed by them, by way of premiums, for effecting insurance on the ship from Madras to Calcutta, and until the ship shall take her departure from Calcutta on some outward voyage. with interest at 9 per cent up to the time of repayment. This stipulation or condition introduces the consideration of the main question, namely, whether this bond or agreement contains any sea risk. 4th. That the master shall hypothecate the ship for the due payment of the bill of exchange for 15,000 rupees, and of the other sums and interest aforesaid.

There can be no doubt as to the law. There must be a maritime risk in the instrument; it matters not in what form of words. Then the question is, whether I can extract from these conditions any expressed intention of the parties that they purported to agree that there should be a maritime risk. Now, first, it is quite clear that there is no maritime risk directly stated. Secondly, I agree that if there were a maritime risk directly stated, the mere fact that the insurance was to be made by the lenders and paid for by the borrowers might not invalidate the bond. There is one case to that effect, I doubt if there be more, and there the circumstances were most peculiar. I refer to the case of the Nelson; the objection was taken there, but was not noticed in the judgment. Thirdly, the insurance is not limited to the arrival of the ship at Calcutta, but is continued until the ship leaves Calcutta. This stipulation appears to me to negative all maritime risk on the voyage from Madras to Calcutta, and to show clearly that the parties contemplated a transaction of a different description. This construction is confirmed by the rate of interest, which is the common rate of interest, as I believe, in that part of the world, and not according to the rate where maritime risk is run; and, moreover, the interest is to be continued until payment. The intention, and so, I think, the true interpretation of this instrument, is to mortgage the ship for principal, ordinary interest and insurance, without any sea risk at all. It is clear that the Court Admiralty has no cognizance over such a transaction. udei This instrument then states the actual advance by Binny & Co., and the drawing of the bill of exchange for 15,000 rupees on Jardine & Co. at thirty days' sight; and then states the agreement of the master, that within thirty-four days after the arrival of the ship at Calcutta he will pay the bill for 15,000 rupees and all interest, and perform the other conditions already recited. But not a word is said of maritime interest or maritime risk. True it is that in some cases the undertaking to pay at a certain time after the arrival of a ship at a port of destination may show an intention to include a maritime risk; but the court must look at the whole instrument, and form its conclusion from a consideration of all its contents. I might add, that there is not the least intimation here that the bill of exchange was given as a collateral security.

It is not necessary to travel further into the particulars of this case. I found my judgment on the instrument itself, but I am of opinion that there are other difficulties, though I abstain from noticing them with any minuteness. For instance, that no proceedings on this bond were had at Calcutta; indeed there could hardly have been any, as the bond specifies a further voyage. All this negatives a maritime risk between Madras and Calcutta. It has not been contended that the maritime risk extended to the whole voyage. Indeed another and a different security was, by the indenture of the 18th of May, 1858, taken for this sum of 15,000 rupees, which again shows that the money was not due on bottomry at Madras.

I pronounce against the bond.

JOOOR v. BURTHOLDMEW.

SECTION II. - THE OBLIGATION.

A. Nature of the Obligation.

TOLMES v. CHANDLER.

KING'S BENCH, 1678.

[2 Levinz, 116.]

Debt upon an Obligation conditioned to perform all Covenants and Conditions, in an Indenture of Mortgage, where there was a Proviso, that if the Mortgagor pay the Money at the Day, that the Mortgage should be void; and for Breach assigns the Non-payment of the Money at the Day: Hereupon the Defendant demurred; and for the Defendant it was objected, That this was no Forfeiture of the Bond, but of the Estate, and that this Condition is annexed to the Estate for the Benefit of the Mortgager, in order to have his Estate again upon Payment of the Money, but not to oblige him to pay the Money. Of this Opinion was Hale, but Twysden contra, and he cited the case of Westbrook, Hill. 22 Car. 1. B. R. Rot. 116, to be so adjudged: upon which it was adjourned; and after another Day he brought the Record of that Case into Court; whereupon Hale changing his Opinion, gave Judgment for the Plaintiff. See 2 Cro. 281, and Yelv. 206, the like Case and the like Judgment.

COOK v. BARTHOLOMEW.

Supreme Court, Connecticut, 1891.

[60 Conn. 24.]

CARPENTER, J. This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts—an ordinary deed for the consideration of \$900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: "The condition of the within deed is as follows: The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her

natural life, that he will provide for all her wants in a reasonable and proper way, will provide her with all needed food, drink and clothing, have a room and fire when needed, lodging and every necessary comfort, both in sickness and health, and at her decease give her decent and proper burial, and erect tombstones at her grave, with a suitable inscription thereon, within one year after her decease, said tombstones to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void, otherwise to remain in full force and effect in law."

The complainant also alleges that the defendant Bostwick subsequently conveyed his interest in the premises to the defendant Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved.

Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. . . . A bond or note is usually taken for the debt, which is described in the deed, with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift's Digest, 182, 183. "To constitute a mortgage the conveyance must be made to secure the payment of a debt." Bacon v. Brown, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." Jarvis v. Woodruff. 22 Conn. 548.

What is a debt? "That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation; liability." Webster's Dictionary.

What is this case? Ammon Bostwick received \$900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her and to erect a tombstone to her memory. To secure the performance of this agreement he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty — the payment of that debt. The obligation falls within an approved definition of debt, and the conveyance is within the legal definition of a mortgage.

There is no force in the objection that this cannot be a mortgage

because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done; and that is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents.

In this case the age, health, general condition and expectation of life of Sarah A. Bostwick must be known; add to these the probable cost of supporting her for one year, and we have the date for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved fourteen years ago. They then, as it seems, fixed the outside limit at \$900. The same thing can be done now as well as then. Possibly \$900 may be considered an equitable limit beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question, we will not consider the question further on this demurrer.

Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would devest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The Court of Common Pleas is advised to overrule the demurrer.

In this opinion the other judges concurred.

BROWN v. COLE.

CHANCERY, 1845.

[14 Simm. 427.]

BILL to redeem a mortgage for a term of years, made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-

assign the mortgaged premises, on being repaid the money lent, on the 1st of April, 1845, with interest in the meantime, by quarterly

e payments.

The mortgagor, having had an advantageous offer, for the purchase of the premises shortly after the mortgage was made, tendered, to the mortgagee, the amount of the principal, and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed: in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The VICE CHANCELLOR allowed the demurrer, on the ground that it was contrary to the practice of the court to decree the redemption of a mortgage, before the day appointed for that purpose had arrived.

BUNKER v. BARRON.

r [79 Me. 62.2] vela

WRIT OF ENTRY, the facts are stated in the opinion of the court.

FOSTER, J. The plaintiff claims that the deed of January 7, 1868, to Paine and the bond back to the same parties constituted a mortgage of the premises, and that the subsequent transactions of February 1, 1875, between William Quint and Paine, extinguished the mortgage, thereby letting in the plaintiff's title upon which he bases this action to recover possession of the premises.

In view of these facts and circumstances together with the evidence before us, it is impossible to arrive at any other conclusion than that it was the intention of the parties by their transactions of February 1, 1875, to leave the former security unaffected, and that the note was not intended as payment of the debt due at that time. There was a change in the form of the debt, but there was no actual payment of it. That is not enough to affect the mortgage. Nothing but payment of the debt or its release will discharge a mortgage. Crosby w. Chase, 17 Maine, 369: Parkhurst v. Cummings, 56 Maine, 159; Ladd v. Wiggin, 35 N. H. 426. "The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt." Jones on Mort. § 924; Pomroy v. Rice, 16 Pick. 24.

Compare: Borill v. Endle, 1896, 1 Ch. 648. — Ed.
 Only one point is printed. — Ed.

not be enlarged by a parol agreement. I think all of the authorities, in this State at least, hold the time for performance of every such contract may be extended by parol. Bigelow v. Rommelt, 9 C. E. Gr. 115; Tomkins v. Tomkins, 6 C. E. Gr. 338; Maryott v. Renton, 6 C. E. Gr. 381; Cox v. Bennett, 1 Gr. 165; Van Houten v. McCarty, 3 Gr. Ch. 148; Stryker v. Vanderbilt, 1 Dutch. 482; Bell v. Romaine, 3 Stew. Eq. 28; Sharp v. Wyckoff, 12 Stew. Eq. 376; Measurall v. Pearce, 4 Atl. Rep. 678; King v. Morford, Sax. 274; Stoutenburgh v. Tomkins, 1 Stock. 332; Baldwin v. Salter, 8 Paige 473; Lattimore v. Harsen, 14 Johns. 329.

Again, the complainants say that if the time for performance of a written contract may be extended or enlarged by parol, some consideration must be shown therefor before the court will enforce such parol contract. The proposition thus stated is supported by the authorities. Parker v. Jameson, 5 Stew. Eq. 222; French v. Griffin, 3 C. E. Gr. 279, 281.

But a court of equity will sometimes prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of such promise. If a party asking the aid of the court waive strict performance of his contract and make promises to the defendant upon which the latter has acted and altered his position, and it should appear to the court to work a hardship to the defendant to allow the complainant to withdraw his waiver, a court of equity always applies the doctrine of estoppel.

In such case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stands in his way; and when this plainly appears, it is most equitable that the court should say that they shall so stand. Martin v. Righter, 2 Stock. 510; Church v. Florence Iron Works, 16 Vr. 133; Phillipsburgh Bank v. Fulmer, 2 Vr. 55; King v. Morford, supra; Huffman v. Hummer, 3 C. E. Gr. 83, 90; Stryker v. Vanderbilt, supra; Miller v. Chetwood, 1 Gr. Ch. 208; Cox v. Bennett, 1 Gr. 165; Lee v. Kirkpatrick, 1 McCart. 264, 267; Continental National Bank v. National Bank Com., 50 N. Y. 575; Garrison v. Garrison, 5 Dutch. 153.

The bill should be dismissed with costs.

Paine's interest passed and became vested in William Barron, who is in possession, as the evidence discloses, by his agent or servant—the defendant in this suit. The rights of the defendant are the same, therefore, as those of the person whom he represents by that possession. This action could not be maintained by the mortgagor against the mortgage or his assignee in possession without showing a satisfaction of the mortgage. Neither can it be maintained by the grantee of the mortgagor. Woods v. Woods, 66 Maine, 206; Jewett v. Hamlin, 68 Maine, 172; Rowell v. Jewett, 71 Maine, 409.

Judgment for the defendant.
Peters, C. J., Danforth, Virgin, Libber, and Haskell, JJ.,

concurred.

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VAN SYCKEL v. O'HEARN.

CHANCERY, NEW JERSEY, 1892.

[50 N. J. Eq. 173.]

BIRD, V. C. The complainants in this case filed their bill to foreclose a mortgage which was held by the testator, in his lifetime, on lands in the bill described. The bond which the mortgage was given to secure had been due for many years. The bill was filed on the twenty-fifth day of November, 1891. In the month of March, 1891, the then owner of the premises entered into negotiations with Patrick O'Hearn, one of the defendants, for the sale to him of the said premises. O'Hearn was willing to purchase the premises, provided the testator, who was then living, would not require the payment of the mortgage which he then held for one year from the 1st of April then next ensuing. Both parties to the said negotiations requested Mr. Wyckoff, a counsellor at law and intimately acquainted with the testator, to procure the consent of the testator that the time for payment of his mortgage should be extended for one year from the 1st of April, 1891. He did procure such consent. Thereupon the negotiations for the sale and purchase of the premises were carried through.

There being no doubt as to the amount of money actually due upon the bond which the mortgage was given to secure, the only question is whether the complainants had a right to commence their suit to foreclose said mortgage before the expiration of the one year from the first day of April, 1891. The complainants say that the obligation being in writing and under seal the time for the performance thereof canHADLOCK v. BULFINCH.

SUPREME COURT, MAINE, 1850.

[31 Me. 246.]

MOTION for a new trial. The testimony was too voluminous to be reported. The following are the principles, as announced by Howard, J., upon which the decision of the court was made.

A mortgage of land can be discharged only by payment of the debt' secured by it, or by a release.

A renewal of the note, secured by such mortgage, is not such a payment as will discharge the mortgage, unless so intended by the parties.

Where the mortgagee takes, for the amount due upon the mortgage, the note of the assignee of the mortgagor, including annual interest, and gives up to such assignee the notes of the mortgagor, this, unexplained, is not to be considered as a mere renewal of the mortgagor's note, but as a substitution of a new security, and is such a payment as to discharge the mortgage.

If the mortgage debt has been paid, no action can be maintained upon the mortgage, even though it has not been formally discharged.

144 Court & POTTER D. EDWARDS.

STRODE v. PARKER.

CHANCERY, 1694.

[2 Vern. 315.]

The bill being to foreclose a mortgage, the interest by the deed was to be £5 per cent per annum and made payable half-yearly, and if not paid by the space of two months after the time of payment, then to pay after the rate of £5 10s. per cent per annum for increase of interest, the interest being run greatly in arrear; the question was, after what rate the interest should be computed upon the redemption of the mortgage.

The court decreed interest to be computed at the rate of £5 per cent per annum only, and took a difference where the interest was reserved at £6 per cent but to be reduced to £5 per cent if paid half-yearly; there if the party will have the benefit of lowering or reducing the interest, he must comply with the times of payment; and so decreed in the Lord Halifax's Case; but where the interest is to be increased, if not paid at the day, that is but in the nature of a penalty and relievable in equity.

Quære tamen, for the agreement of the parties seems to be the same—in either case, and whether interest is to be reduced upon compliance with the times of payment, or to be advanced in default thereof, seems only to be a difference in the expressing one and the same thing.¹

POTTER v. EDWARDS.

CHANCERY, 1856.

[26 L. J. Ch. 468.]

Kindersley, V. C. It does not appear to me that there is any contradistinction of the statements made by the defendant respecting the facts of this case. They are distinctly set forth in the answer, and supported by affidavit. The intention of the parties, therefore, seems to have been that £700 only was to be advanced, although the mortgage was to be a security for £1,000. The security appeared, and with justice, to be of a questionable character, and the defendant in

¹ See Goodyear Co. v. Selz, 157 Ill. 186. — Ep.

fact agreed to lend no more than £700 upon having a mortgage for £1.000, in consideration of the risk and hazard attending the transaction. The plaintiff, however, thinks it consistent with justice now to say, "We will tender you £700, and if you refuse it we will stop the interest and prove that no more than £700 was actually paid." The court has nothing to do with the honesty of this proceeding, but only to decide whether the plaintiff can succeed in his contention. has been said that it would be contrary to the Statute of Frauds to allow parol evidence to contradict the plaintiff's case, but it appears to me just the contrary, for it is the plaintiff who is seeking to introduce parol evidence to vary the written instrument. The deed appears to me to be exactly what the parties intended it to be, that is, a security for £1,000 upon having an advance of £700. It is true that, in an ordinary case, where there is a mortgage for £1,000, and it is proved that £700 only has been advanced, the court will only allow it to stand for £700, but in this case there is uncontradicted evidence of an arrangement to a different effect. I was much struck with the fact, that the gentleman who prepared the mortgage-deed was not informed of the agreement between the parties, but there does not appear to have been any fraud intended in this respect. It would have been better if the information had been given because then no attempt would have been made by the plaintiff to set up his present case. My opinion is, that the plaintiff can only be allowed to redeem upon payment of the full sum of £1,000, and the tender consequently must go for nothing. But if I had come to a different conclusion, I certainly should not have stopped the interest on account of the tender.

The decree will be in the usual terms.1

B. Subsequent Advances.

GORDON v. GRAHAM.

CHANCERY, 1716.

[2 Eq. Cas. Abr. 598.]

A. Mortgages to B. for a Term of Years, to secure a Sum of Money already lent to A. as also such other Sums as should hereafter be lent or advanced to him. A. makes a second mortgage to C. for a certain Sum, with Notice of the first Mortgage; and then the first Mortgagee, having Notice of the second Mortgage, lends a further Sum, &c. Per Cowper, Lord C. The second Mortgagee shall not redeem the first Mortgage, without paying as well the Money lent after, as that lent

¹ See Campbell v. Tompkins, 32 N. J. Eq. 170. — Ed./

before the second Mortgage was made; for it was the Folly of the Second Mortgagee, with Notice, to take such Security. But upon the Importunity of the Counsel, it was ordered, that the *Master* should report what Money was lent by the first Mortgagee after he had Notice of the second Mortgage.

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HOPKINSON AND ANOTHER v. ROLT.

House of Lords, 1861.

[9 House of Lords, 514.1]

THE LORD CHANCELLOR (LORD CAMPBELL). My Lords, this appeal raises a question of great importance to bankers, and to the mercantile interests of the country.

Independently of any particular agreement between these parties, either express or to be implied from their dealings, beyond what is to be found in the written documents, I think the question is accurately as well as tersely stated by Lord Chancellor Chelmsford in the judgment appealed against, "A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it; is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?"

The supposed decision of Lord Chancellor Cowper in Gordon v. Graham, is relied upon by the appellants as a conclusive authority in their favor. But the report of the case in both books is evidently from the same note-taker; and, as it appears in both books, it is very meagre, and in some material points certainly incorrect. When the registrar's book is examined, and the bill and answers and directions are considered, the facts of the case are found to be exceedingly complicated; and I must say, that I do not think that the facts which were there actually alleged and proved, are by any means equivalent to those which raise the question before us.

I must say that the doctrine seems to me to be contrary to principle. Although the mortgagor has parted with the legal interest in the hereditaments mortgaged, he remains the equitable owner of all his interest

¹ The extract from the opinion of Lord Campbell here printed sufficiently states the case. — Ep.

not transferred beneficially to the mortgagee, and he may still deal with his property in any way consistent with the rights of the mortgagee. How is the first mortgagee injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent The first mortgagee is secure as to past advances, and he is not under any obligation to make any further advances. only to hold his hand when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security. The benefit of the first mortgage is only lessened by the amount of any interest which the mortgagor afterwards conveys to another, consistent with the rights of the first mortgagee. the mortgagor is entitled to do what he pleases with his own. consequence certainly is, that after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of puisne encumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he chooses voluntarily to make further advances, to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee in making the advances, with notice of the first mortgage; for, by the hypothesis each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse further advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider (as they do as often as they discount a bill of exchange), what is the credit of their customer, and whether the proposed transac-Appeal dismissed.1 tion is likely to lead to profit or to loss.

¹ Accord: Young v. Young, L. R. 3 Eq. 801; Bradford Co. v. Briggs, 12 App. Cas. 29; Freeman v. Laing, 1899, 2 Ch. 355; Shiras v. Craig, 7 Cranch, 34; Re Haake, 2 Sawy. 23; Takia v. Demantine; 77 Cal. 383; Boswell v. Goodwin, 31 Conn. 74; Frye v. Bank, 11 Ill. 367; Bruekmeyer v. Browneller, 55 Ind. 487; Nelson v. Boyce, 7 J. J. Marsh. 401; Wilson v. Russell, 13 Md. 494; Ladue v. Detroit Co., 13 Mich. 380; Ward v. Cooke, 17 N. J. Eq. 93; Farr v. Nichols, 132 N. Y. 327; Spader v. Lawler, 17 Ohio, 371; Banks' Appeal, 36 Pa. 170; McDaniels v. Colvin, 16 Vt. 300. — Ed.

ACKERMAN v. HUNSICKER.

COURT OF APPEALS, NEW YORK, 1881.

[85 N. Y. 46.1]

Andrews, J. The mortgage from Levi, to the plaintiff, was given to secure the mortgagee, for any indorsements he had made, or should thereafter make, for the mortgagor, or the firm of Levi & Miller, to the amount of \$6,000. It was dated May 2, 1874, and was recorded May 3, 1874. The first indorsement was made May 7, 1874, and the last October 16, 1874. The plaintiff has been compelled to pay the indorsed paper, and has advanced for that purpose the sum of nearly \$5,000, over and above all payments made by the mortgagor. This action is brought to foreclose the mortgage, and the only controversy relates to the priority of lien as between the mortgagee and judgment creditors of the mortgagor, whose judgments were obtained subsequent to the mortgage, but prior to the indorsement by the plaintiff, of some of the notes, which enter into and form a part of the mortgage debt.

The question is whether the mortgage is a paramount lien to the judgments as to that part of the mortgage debt arising out of indorsements made after the judgments were docketed. It is not claimed that the plaintiff had actual notice of the judgments when he indorsed the paper, and it is found by the referee that he never had personal notice or knowledge, or any notice of their existence, until after all the indorsements had been made. The judgments were docketed in the county where the mortgaged premises were situated. If the docketing of the judgments was constructive notice to the plaintiff of their existence, then he had notice of the judgments; otherwise he had none.

There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable , parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security, on each new transaction. It is well known that such mortgages are constantly taken by banks, and bankers, as security for final balances, and banking facilities are extended, and daily credits given, in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established. (Bank of Utica v. Finch, 3 Barb. Ch. 294; Truscott v. King, 6 N. Y. 147; Robinson v. Williams, 22 id. 380; Shirras v. Caig, 7 Cranch, 34; Lawrence v. Tucker, 23 How. [U. S.] 14; Leeds v. Cameron, 3 Sumn. 492.)

There can be no doubt, therefore, that the mortgage in this case, as between the parties to it, is a valid security for the plaintiff's debt. It

¹ This case is abridged. — ED.

is equally clear that to prefer an intervening encumbrance over the claim of the plaintiff, would violate the understanding of the parties to the mortgage, at the time it was executed, for the plain intention was, that the interest of the mortgagor in the land, as it existed when the mortgage was given, should be bound as security for all liabilities which the plaintiff might incur as indorser, upon the faith of the mortgage. It could not have been intended that the plaintiff should be deprived of any part of the security of the mortgage for any part of the indorsed paper. It would have been a clear breach of good faith on the part of the mortgagor, if he had, without notice to the mortgagee, voluntarily encumbered the land by liens having priority of the mortgage, and then applied to the plaintiff for, and procured further indorsements.

The doctrine that a party who takes a mortgage to secure further optional advances, upon recording his mortgage is protected against intervening liens, for advances made upon the faith and within the limits of the security, until he has notice of such intervening lien, and that the recording of the subsequent lien is not constructive notice to him, has, we think, been generally accepted as the law of the State, at least since the decision in Truscott v. King. It would not be wise, under the circumstances, now to adopt the opposite view, even though we should regard it as better supported by reason. It seems to us, however, that the doctrine which we have affirmed in this case is most consistent with equity, and establishes a rule which is reasonable, and easy of application. The opposite rule imposes the burden of notice and vigilance upon the wrong person. The party taking the subsequent security may protect himself by notice, and as is said by Mr. Jarman in his notes to Bytherwood's Conveyancing: "No person ought to accept a security subject to a mortgage authorizing future advances, without treating it as an actual advancement to that extent."

These views lead to a reversal of the order of the General Term and an affirmance of the judgment entered upon the report of the referee.

All concur. Order reversed, and judgment affirmed.

WEST v. WILLIAMS.

CHANCERY, 1898.

[1898, 1 Ch. 488.2]

Kekewich, J. It was necessarily admitted on behalf of the plaintiff that his mortgage of December 24, 1895, must be postponed

to that of the defendants, Philip Addison Williams and John William Williams, of April 2 1896, as regards the sum of £2,297 then advanced by them, and such other sums (if any) as were advanced by them on the same security at a later date but before they received notice of the plaintiff's mortgage. It was contended that, as regards any sums advanced after the receipt of that notice, the plaintiff's mortgage has priority; and in support of this contention counsel relied on the authority of Hopkinson v. Rolt. There is much in the report of that case depending on the conduct of the respondent, the pleadings, and the supposed authority of Gordon v. Graham, which was then finally overruled; but the point really decided is briefly, but accurately, stated in the first branch of the head-note to the report, which runs as follows: "A first mortgagee, whose mortgage is taken to cover what is then due and also future advances (within a fixed amount), cannot claim the benefit of such advances in priority over a second mortgagee, of whose mortgage he had notice at the time of its execution, and before he made these new advances." The doctrine there laid down not merely has never been questioned - which, of course, it could not be - but has been largely applied to cases of a Neither in Hopkinson v. Rolt, nor in any of the similar character. cases which have followed it, has there been, so far as I am aware, any obligation on the first mortgagee (whose position, by reason of the omission of the plaintiff to give notice of his charge, is here filled by the defendants Williams) to make further advances; and in Hopkinson v. Rolt the mortgage was created in favor of bankers and to secure a current account. It seems to me that, if once you introduce the element of obligation to make further advances, the authority of Hopkinson v. Rolt is inapplicable; and that view is supported by more than one passage in the speeches of the Lord Chancellor (Lord Campbell) and Lord Chelmsford in the House of Lords. I do not myself see any substantial difference for this purpose between a present advance and A a covenant to make certain advances at a future time on which the covenantee may maintain an action not to be answered by a plea that \(\) in the meantime the mortgagor has created another charge on the mortgaged premises.

The plaintiff therefore is entitled to no relief against the (first) mortgagees of April 2, 1896, or the trustees of the settlement and there

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must be judgment for them with costs.

C. Defences to Enforcement.

AYLET v. HILL.

CHANCERY, 1779.

[2 Dick. 551.]

A MORTGAGEE forecloses, and, having a bond as a collateral security, brings an action on the bond.

Motion to stay proceedings at law on the bond.

The LORD CHANCELLOR held that the mortgagee might proceed at law on his bond, notwithstanding he had obtained a decree of foreclosure, and denied the motion.

NEWBOLD v. NEWBOLD.

CHANCERY, DELAWARE, 1825.

[1 Del. Ch. 310.1]

Petition for an Injunction. — This was a petition of John Newbold for an injunction, accompanied by an affidavit of the petitioner, setting forth, as the ground of the petition, the following facts, viz:

The petitioner, on the 27th of August, 1823, executed a mortgage of certain real estate, in Delaware County, Pennsylvania, to the Farmers' and Mechanics' Bank in the City of Philadelphia, one of the defendants, to secure the debt of \$15,400, payable with interest, on or before the twenty-seventh day of August, 1825. Accompanying the mortgage was the petitioner's bond for the same debt, with a warrant of attorney for the confession of judgment. The bond and mortgage were afterwards assigned by the Bank to the other defendants, Michael Newbold, Thomas Newbold and William Black, Jr., executors of Thomas Newbold, deceased, by whom said securities are now held. The petition then set forth that the defendants, Michael Newbold.

1 Only one point is printed. - ED.

Thomas Newbold and William Black, Jr., executors of Thomas Newbold, dec'd, had caused judgments to be entered upon the petitioner's aforesaid bond in the Supreme Court of the State of Delaware for New Castle County; that upon said judgment a writ of fieri facias had been issued and the same had been levied upon the before-mentioned real estate of the petitioner situated in New Castle County, notwithstanding the said executors held for the same debt a mortgage on the tract of land in Delaware County, in the State of Pennsylvania, of a value far more than sufficient, at a sheriff's sale, to discharge the said debt after paying the prior liens upon it, which tract of land the said executors then had in their actual possession and were in receipt of its profits.

The CHANCELLOR refused to award the writ, and assigned the following as his reasons:

Upon the best consideration which I can give to the subject, I do not think that upon the case made in the petition the writ of injunction should be ordered.

It seems to me to be clearly and reasonably settled that a mortgagee may use all the remedies upon a bond and mortgage which the law affords, at the same time, and consequently any one of them which he prefers; but that he shall not take a double satisfaction for the debt. In Booth v. Booth, 2 Atk. 343, Lord Hardwicke says, "though the defendant is foreclosing the equity of redemption here, yet he is not precluded from bringing an ejectment at law at the same time, unless there is something very particular to take it out of the common case." And Lord Redesdale, in 1 Sch. & Lef. 176, states the general rule to be, that "where a party is suing in this court he shall not be allowed to sue at law for the same debt. But the case of a mortgage is an exception to this rule; he has a right to proceed on his mortgage in equity, and on his bond at law at the same time." In the case before Lord Redesdale there was something "very particular," (as Lord Hardwicke said) which formed an exception to the general principle, but not applicable to the present question. And in 3 Johns. Ch. Rep. 331. Chancellor Kent says it seems to be generally admitted in the books, that the mortgagee may proceed at law on his bond or covenant at the same time that he is prosecuting his mortgage in chancery.

If the mortgagee may thus proceed, both at law and in equity, he certainly may have the fruit of both, or of either, so that he does not take a double satisfaction; and whether he proceeds at law on the bond and mortgage, or at law on the bond and in equity on the mortgage, the principle is the same. Here, the mortgage is not proceeding on the mortgage. In 1 Yeates R. 9, where a suit was brought on a bond which accompanied a mortgage, the court would not prevent the plaintiff from levying it on what land he pleased.

Petition dismissed.

be in that respect like a WelslBurton v. Hintrager, 18 id. 348; ment would defeat the title of v. Bergen, 16 id. 555; Crow, the notes recognizes the debt. Hendershott v. Ping, 24 id. 134; payment. It is to be discharge

debt is paid. In Toplis v. Bakerestion before us, for, unless it that "if the collateral security or is, under the law, no longer bond, the Statute of Limitations trust stands as a security for its the mortgage as it was." debtor, Cox, arrested the opera-

In the case at bar the questil the remedy upon the indebtedpaid, has been submitted to the jied of trust may be enforced to The condition upon which the

performed, the court is of opinited by the authorities cited, and for possession as upon a mortgagdeducible therefrom, as to forbid

the same principles, that an adco pay, which suspends the operaeps alive the lien of a mortgage
CLINTON COU Tahon v. Cooley et al., 36 Iowa,
in principle from the one before
Supreme Con barred but for the suspension
[371e one case by a new promise, in

Beck, Ch. J. The facts upon based upon the fact that Butter-this case arises are these: The differeclose the mortgage within the field were executed more than ter publication, notwithstanding the the suit, but Cox, who executed the case just cited. In that case State for a sufficient time to take fore the time fixed by the statute, out of the operation of the Statute that as ten years have run in deed of trust to secure the paymetught, it is now limited. But the as a mortgage. Rev. § 3673. Chase cited, we have, in effect, held to be considered as a mortgage. If limitation provided for by the against the land barred by the state of the non-residence of Cox is sented by the case for our decision sufficient answer to the argument.

Under the laws of this State a ght by appellee's counsel, will, in title to, lands, but is simply a liedship. Lands may be purchased the indebtedness which is its for may rest, under the supposition curity, in the nature of a lien—othe statute, and may be subjected be paid or discharged, or the murchasers. But the hardships in bearing a lien for the protection out from the parties acting under a it is not relieved of the duty of H relying upon presumptions and that purpose. When the debt is Against hardships thus arising may no longer be enforced, its i

rt upon the demurrer is reversed, her proceedings not inconsistent Reversed.¹

er, 51 Oh. St. 254.—Eb.

Thomas Newbold and William , mortgage, and nothing short of paybold. dec'd, had caused judgmerthe mortgagee. Now the reference to aforesaid bond in the Supreme The mortgage is given to secure the New Castle County; that uponed and rendered of no effect when the had been issued and the same r, 2 Cox, 123, it was said by the court, tioned real estate of the petitiquad been a note of hand instead of a notwithstanding the said execut, would run against the note and leave on the tract of land in Delaware

of a value far more than sufficie on, whether or not the debt has been said debt after paying the priolity, who have decided in the negative. said executors then had in their nortgage was given not having been of its profits. on that the demandant have judgment

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affords, at the same time, and coprefers; but that he shall not t Ia. 570.]

In Booth v. Booth, 2 Atk. 343, which the only question involved in defendant is foreclosing the equed of trust and notes held by Butterprecluded from bringing an ejeq years prior to the commencement of there is something very particulthem, has been a non-resident of the And Lord Redesdale, in 1 Sch. an action against him upon the notes be, that "where a party is suingte of Limitations. Rev. § 2745. A to sue at law for the same debut of money is enforced by foreclosure exception to this rule; he has sounsel agree that, in this case, it is equity, and on his bond at law als Butterfield's remedy by foreclosure Lord Redesdale there was somatute? This is the sole question pre-Hardwicke said) which formed an.

but not applicable to the présent mortgage conveys no interest in, or 331. Chancellor Kent says it so thereon for the purpose of securing books, that the mortgagee may pundation. It is an incident — a seat the same time that he is prosef the debt. It survives until the debt

If the mortgagee may thus prortgage is released. It is a convoy certainly may have the fruit of f the debt, and as long as that exists take a double satisfaction; and rotection or rendered ineffective for bond and mortgage, or at law o discharged or, by operation of law, gage, the principle is the same. functions terminate, and not before.

on the mortgage. In 1 Yeates plaintiff from levying it on what I

Gower v. Winchester, 33 Iowa, 303; Burton v. Hintrager, 18 id. 348; State v. Lake, 17 id. 215; Vannice v. Bergen, 16 id. 555; Crow, McCreery & Co. v. Vance, 4 id. 435; Hendershott v. Ping, 24 id. 134; Packard v. Kingman, 11 id. 219.

These principles determine the question before us, for, unless it appears that the debt is discharged, or is, under the law, no longer capable of being enforced, the deed of trust stands as a security for its payment. The non-residence of the debtor, Cox, arrested the operation of the Statute of Limitations, and the remedy upon the indebtedness still exists. The lien of the deed of trust may be enforced to satisfy the debt.

These doctrines are so well supported by the authorities cited, and the conclusion we reach is so plainly deducible therefrom, as to forbid discussion. We have held, applying the same principles, that an admission of a debt and a new promise to pay, which suspends the operation of the Statute of Limitations, keeps alive the lien of a mortgage given to secure the indebtedness. Mahon v. Cooley et al., 36 Iowa, 479. The case is not distinguishable in principle from the one before us. In each the debt would have been barred but for the suspension of the operation of the statute, in the one case by a new promise, in the other by non-residence.

The argument of appellee's counsel, based upon the fact that Butter-field could have brought an action to foreclose the mortgage within the ten years, upon service of process by publication, notwithstanding the non-residence of Cox, is answered by the case just cited. In that case an action could have been brought before the time fixed by the statute, ten years, expired. Counsel contend that as ten years have run in which an action could have been brought, it is now limited. But the law does not so provide, and, in the case cited, we have, in effect, held otherwise. But in truth, the time of limitation provided for by the statute has not expired, for the period of the non-residence of Cox is expressly taken therefrom. This is a sufficient answer to the argument.

The conclusion we reach, it is thought by appellee's counsel, will, in this and other like cases, work hardship. Lands may be purchased upon which old, unsatisfied mortgages may rest, under the supposition that they are satisfied or barred by the statute, and may be subjected to such liens in the hands of the purchasers. But the hardships in such cases result not from the law, but from the parties acting under a mistaken notion of their rights, and relying upon presumptions and protection not recognized by the law. Against hardships thus arising courts can extend no protection.

The judgment of the District Court upon the demurrer is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.1

¹ Compare: Kerr v. Lydecker, 51 Oh. St. 254. - Ep.

WARING v. SMITH.

CHANCERY, NEW YORK, 1847.

[2 Barb. Ch. 119.1]

The Chancellor. The case, therefore, which is presented by the bill, is simply this: The holder of a bond and mortgage, without authority from either of the mortgagors, and without the knowledge of one of them, alters the condition of such bond and mortgage, in two very essential particulars, to their disadvantage; and after the one who is informed of the fact had declined to ratify the alteration, by a reacknowledgment, the mortgagee passes off the bond and mortgage as valid and genuine securities, to secure the repayment of a loan of money to himself. And the question now to be considered is this: can the assignees of the person who has been guilty of this fraud, or any other person claiming title to the bond and mortgage under him, or them, as the assignee thereof, enforce the collection of the mortgage, in a court of equity, against the mortgaged premises, in the hands of the mortgagors, or either of them?

It was formerly held, that the alteration of a bond, or other sealed instrument, in a material part, even by a stranger, without the consent of the party whose rights were affected by such alteration, avoided the deed. (Pigott's case, 11 Coke's Rep. 27.) The modern and more sensible rule, however, is, that such an alteration, if made by a party claiming to recover on such bond or instrument, or by any person under whom he claims, renders the deed void; but that an alteration by a stranger, without the privity or consent of the party interested, will not render the deed void, where the centents of the same, as it originally existed, can be ascertained. (Rees v. Overbaugh, 6 Cowen's Rep. 746; Mathis v. Mathis, 3 Dev. & Bat. Rep. 60; Henfree v. Bromley, 6 East, 309.) I apprehend, however, that the burden of proof in such cases, is cast upon the party seeking to recover upon the deed, to show that the alteration was not made by him, or by those under whom he claims, nor with his or their privity or consent.

A distinction is made between deeds which operate to convey the title to property, and those which merely give a right of action. For, where the legal title to real estate passes to the grantee by the execution and delivery of a deed, a fraudulent alteration of the deed, by such grantee, will not have the effect to revest the title in the grantor, in cases where the Statute of Frauds requires a written conveyance to transfer the title. (Doe, ex dem. Berkley v. Archbishop of York, 6 East's Rep. 86; Mitler v. Mainwaring, Cro. Car. 397; Maginnis v. McCulloch, Gilb. Eq. Rep. 235; Morgan v. Elam, 4 Yerg. Rep. 375; Doe, ex dem. Beauland v. Hirst, 3 Stark. Rep. 60; Lewis v. Payn, 8

¹ This case is abridged. — ED.

Cowen's Rep. 71.) In this class of cases it is held, that the title to the estate, which was vested in the grantee by a genuine and valid conveyance, remains in the grantee, although he destroys or makes void the deed itself, by a forgery, or by a voluntary cancelment of the conveyance which created that title. But the deed itself is avoided thereby; so that the grantee cannot recover upon the covenants therein, nor sustain any suit founded upon the deed as an existing and valid instrument.

The case is much stronger against the complainant in this State, where the mortgagor is, for most purposes, considered the legal as well as the equitable owner of the mortgaged premises, previous to foreclosure; and where a discharge of the debt leaves the legal title to the premises in the mortgagor, or those who have derived title thereto under him, as if no mortgage had ever been given. Before the adoption of the Revised Statutes, it was settled by the courts of this State, that the mortgagor was to be considered as the real owner of the fee, of the lands mortgaged, except for the mere purposes of protecting the mortgagee as the holder of a security thereon for the payment of his debt. (See Runyan v. Mersereau, 11 John. Rep. 534.) And the Revised Statutes have restricted the legal rights of the mortgagee still further, by depriving him of the power to bring a suit to recover the possession of the mortgaged premises, before a foreclosure. The only right he now has in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. The mortgage then is here nothing but a chose in action; or a mere lien or security upon the mortgaged premises, as an incident to the debt itself. And where the mortgagee has released or discharged his debt, by an improper and voluntary alteration or destruction of the bond and mortgage by which it is secured, he ought not to be permitted to sustain a suit, in any court, for the recovery of his debt, the basis of which suit must be the securities thus voluntarily destroyed or made void.

N. F. Waring, the mortgagee, who was guilty of the improper acts of altering this bond and mortgage, and of their passing them off to the insurance company, as good and available securities, certainly would not himself have had the right to come into this court to foreclose the mortgage. And his assignees sit in the seat of their assignor, and are not entitled to any relief, against these defendants, which the assignor himself could not have claimed.

The decretal order of the Vice Chancellor, which is appealed from, is therefore right, and it must be affirmed with costs.

McKAY v. FUNK.

SUPREME COURT, IOWA, 1873.

[37 la 662.]

BECK, Ch. J. I. The appellant claims that the District Court had not jurisdiction in the case to proceed to judgment either in the fereclosure of the mortgage or on the personal claim against the defendant, but should have stayed proceedings in each upon defendant's motion. The proceedings are of a double character and object: 1. To foreclose the mortgage and subject the lands to the lien thereof; 2. To recover judgment against defendant personally, which may be enforced, for the amount of the debt remaining unsatisfied after the sale of the lands upon the decree of foreclosure.

It has been determined by this court that the bankruptcy of the mortgagor does not defeat the jurisdiction of the State court to entertain a cause of foreclosure when the assignee has taken no steps to redeem from the mortgage, and the mortgagee has not filed a claim for the debt secured, in the bankrupt proceeding; acts which are necessary to give the Bankrupt Court jurisdiction over the mortgaged property. Brown v. Gibbons, ante.

Following this decision we hold that the District Court possessed jurisdiction to entertain the foreclosure proceeding, and by proper decree order the sale of the property, and the application of the proceeds to the payment of the mortgage debt. The decree to that extent is affirmed.

II. The other proceedings in this action looking to a personal judgment against defendant, inasmuch as they involved a matter—a personal debt against one adjudged a bankrupt—which was within the jurisdiction of the Bankrupt Court, ought, under section 21 of the Bankrupt Act, to have been stayed, and nothing further done therein after defendant's motion until the final determination of the question of the bankrupt's discharge. Doubtless it was esteemed by the court below that the order staying execution fully complied with the requirements of the section of the Bankrupt Act just cited; but it does not so appear to us. After the motion was filed nothing ought to have been done further than the entering of an order staying proceedings. But a judgment was rendered, which, however, was not to be enforced by execution until the further order of this court. The law was not followed, and the judgment against defendant personally was, therefore, erroneous, and must be reversed.

As it does not appear that specific objection on these grounds was made to this judgment in the court below, and as the decree of fore-closure is affirmed, the reversal will be without costs.

The defendant will pay all the costs of this appeal. The cause will be remanded for proper proceedings in harmony with this opinion.

Affirmed as to the decree of foreclosure. Reversed as to the personal judgment against defendant.

HARRISON v. OWEN.

CHANCERY, ENGLAND, 1738.

[1 Atk. 519.]

This cause went off to an issue, to try whether certain mortgages were fairly cancelled by the mortgagee, or whether they were fraudulently and by stealth carried away by the mortgagor, and the seals cut off by him.

LORD CHANCELLOR said in this cause, that if a mortgagee cancels a mortgage, and it is found so in his possession, it is as much a release as cancelling a bond, but it does not convey or revest the estate in the mortgagor, for that must be done by some deed.



STILLMAN v. LOONEY.

SUPREME COURT, TENNESSEE, 1866.

[3 Cold. 20.]

SHACKELFORD, J., delivered the opinion of the court.

This bill was filed on the chancery side of the Common Law and Chancery Court at Memphis, to forcelose a mortgage executed by the defendant, on three lots in the City of Memphis, which had been duly registered to secure the payment of two notes, of \$2,500 each, dated July 22, 1852, due in twelve and twenty-four months from date, payable at the Union Bank, indorsed by Stillman & Beach. The answer of the defendant and the proof, shows the consideration for which the notes were executed was Confederate Treasury notes. The Chancellor dismissed the bill; from which the complainant has appealed.

It is a well-settled principle in executing contracts, if the consideration is illegal and against public policy, the court would not lend its active aid to enforce it. No rule of law is more clearly defined and settled than this, in the American and English Jurisprudence: 3 Head, 297 and 723; 6 Bing. 174; 10 Bing. 110. This court, held in the case of Overall v. Wright, deceased, at Nashville, December Term, 1865, in manuscript, that an agreement to credit a payment in Confederate Treasury Notes, for which Mr. Wurtz had given his receipt, and on the trial sought to have credited on the note, was no payment; that Confederate Treasury Notes were issued for an unlawful purpose, and in violation of the laws of the State, and Constitution of the United States, and that all contracts founded upon them, was illegal, and could not be enforced through the courts. In the case of Craig v. the State of Missouri, the Supreme Court of the United States held, a promissory note given for certificates issued at the Loan Office of Chariton, Missouri, payable to the State of Missouri, under the Act of the Legislature establishing Loan Offices, was void, 4 Peters, 410, the Act being in conflict with the Constitution of the United States.

In the case under consideration, the notes were issued by an unlawful confederation of States, whose declared purpose was to overthrow the Constitution. The enforcement of all such contracts is against public policy. The party seeking the aid of the court will be repelled. The defendant, not out of any favor to him, but because he is such, can allege and show the illegality of the contract. That being made apparent, the legal consequences follow.

There is no error in the decree of the Chancellor, and the same is

affirmed.

APPONAUG BLEACHING, DYEING, & PRINTING CO. v. RAWSON ET AL.

SUPREME COURT, RHODE ISLAND, 1900.

[22 R. I. 123.]

BILL in equity to redeem property alleged to have been conveyed by a trust in the nature of a mortgage. The bill alleged that the complainant, being unable to pay its indebtedness in full, entered into an agreement with R., one of the respondents, for the purpose of preventing a sacrifice of its property and effecting a settlement with its creditors for 20 per cent, by which arrangement it was to convey all its property to R. in trust; that R. was to carry on the business and pay the creditors of A., so far as they would accept 20 per cent of their claims; and upon repayment to R. by A. of all moneys used to effect such settlement and the necessary expenses incurred, with interest on said amount and, the cost of all permanent improvements made on the property and the further sum of \$5,000 as payment for his services, R. agreed to reconvey all the property to A.; that A. conveyed all its property to R. by absolute deed and bill of sale, and R. executed an agreement, which was not recorded, to reconvey said property on said terms at the expiration of one year from the date of said agreement: that the value of said property was much greater than the amount necessary to pay 20 per cent of its indebtedness and the \$5,000 for services. The bill alleged that R. thereafter conveyed all said property to the X. corporation, which received the same with notice of said agreement. The bill averred an offer and readiness to pay R, the amount of money expended by him, but alleged a refusal by R. to furnish any information thereof. The bill asked for an accounting, and that the complainant be permitted to redeem the property in accordance with the agreement. Heard on demurrer to bill, and demurrer sustained.

PER CURIAM. We do not think that the transaction set out in the bill was a mortgage, as contended in behalf of the plaintiff, but that, the corporation being insolvent, it was rather a scheme on its part to enforce a settlement with its creditors on its own terms. As such it was clearly fraudulent and void as against creditors, and the complainant is therefore in no position to ask the intervention of the court.

The case of Hudson v. White, 17 R. I. 519, was not a case of a fraudulent conveyance, and the statement alleged to be a dictum was that one not a creditor and being neither grantee nor grantor could not

raise that question as to such a conveyance. In the present case the grantor seeks to redeem from the grantee upon a secret trust which he claims operates as a mortgage.

Demurrer sustained.



SCHOOLE AND WIFE v. SALL.

CHANCERY, IRELAND, 1803.

[1 Sch. & Lefr. 176.]

The bill was filed by Schoole and wife, administratrix of her mother Elinor Crigan, to foreclose a mortgage made to the intestate. The plaintiff's wife having got the title-deeds of the mortgaged estate into her possession, and being separated from her husband, had lodged them in the hands of Taylor, an attorney (now deceased), whom she had employed to conduct a suit against her husband; and the representatives of Taylor alleged that they had a lien on these deeds for the costs of such proceedings, and refused to give them up. Schoole in the meantime was proceeding at law upon the collateral security. Under these circumstances, a motion was now made on the part of the defendant for an injunction to stay proceedings at law, and that his recognizance might be taken for the sum due on the foot of the mortgage, until the title-deed should be brought in for the purpose of reconveying the estate.

LORD CHANCELLOR. The general rule is, that when a party is suing in this court, he shall not be allowed to sue at law for the same debt. But the case of a mortgagee is an exception to this rule; he has a right to proceed on his mortgage in equity and on his bond at law, at the same time. - So, the mortgagor has a right not to be obliged to pay the money on his bond, if he is in danger of not getting back his title-deeds: the mortgagee can have nothing but on condition of re-conveying and giving up the title-deeds which he I remember a case where the mortgagee died without has received. any heir that could be discovered, and the court restrained the executor of the mortgagee from proceeding at law to compel payment of the money, there being no heir who could re-convey: the money was ordered into court until the executor should find the heir, and the cause remained some years in court, until at last it was thought worth while to get an act of parliament to revest the estate, on an allegation that the heir could not be found, and the Crown giving its consent.

In this case, Mr. Schoole claims in right of his wife, and he must therefore answer for the conduct of his wife, be it what it may, and for the conduct of the attorney whom she employed, so far as that conduct is injurious to the defendant. It is evident that Schoole has it not at present in his power to make a re-conveyance, so that if he should be allowed to recover the money on the judgment, the mortgagor would be put to great inconvenience. Therefore I shall direct an injunction to stay proceedings at law, and refer it to a master to take an account of what is due for principal, interest, and costs, and the costs of the proceeding at law (for I do not think that proceeding so unconscientious on the part of Mr. Schoole as to deprive him of his costs); and that the money shall be paid into the bank, to remain until the title-deeds are secured and a re-conveyance can be had. Mr. Sall must pay the costs here also.

OCEAN NATIONAL BANK v. FANT.

COURT OF APPEALS, NEW YORK, 1872.

[50 N. Y. 474.]

RAPALLO, J. The note upon which the defendant is sued, as indorser, contains a statement that the maker has deposited with the payee, as collateral security, certain railroad bonds, with authority to sell them without notice in case of non-payment of the note; and it is found as a fact that these collaterals came to the hands of the plaintiff when it became the holder of the note.

We think that the court below was clearly right in holding that an agreement to restore these collaterals to the maker, on payment of the note, is to be implied from the transaction as stated in the instrument itself, and that the acts should be simultaneous. The right of the maker to receive these collaterals when he should pay the note stood upon the same footing as his right to the surrender of the note itself; and, laying out of view special cases of lost notes, it is well settled that, to constitute a valid demand, the note must be produced, and ready to be surrendered on payment. Story on Prom. Notes, §§ 445, 448, 107; Smith v. Rockwell, 2 Hill, 482; Edwards on Bills, 503, 504.

It would be most unreasonable to require the maker to pay such a note in the absence of the collaterals, which frequently consist of negotiable securities, and to trust to his legal remedies against the holder to recover them.

It is found as a fact that, at the time payment of the note was demanded of the maker, he demanded of the notary presenting it a return of the collaterals, and stated that he was ready and willing to pay the note on production of the collaterals; but that the notary did not have them, and the maker's refusal to pay was on the sole ground that the collaterals were not produced. Without any further demand, and without showing any tender or even the production of the collaterals, ready to be surrendered, the defendant was sued as indorser.

The case contains evidence sustaining the findings, and we think the conclusion was correct that the collaterals, not being produced or in readiness to be surrendered on payment of the note, and the refusal being on that ground alone, the demand and refusal proved were insufficient to charge the indorser.

Judgment affirmed.

CHAPTER IV.

water properties.

THE POSITION OF THE MORTGAGEE.

SECTION I. — TITLE.

A. Mortgagee as Grantee.

CHISSUM v. DEWES.

CHANCERY, 1828.

[5 Russ. 29.]

THE trustees of Great Dover Street, by lease dated the 16th of March, demised a house to Dewes for the term of fourteen years, to commence from the 10th of October, 1812, at a yearly peppercorn rent; and in it they covenanted, that the lessors would not, at the expiration of the term, make any claim on the head landlord for any benefit of renewal. Dewes, who carried on the business of an upholsterer on the premises, deposited his lease with Dickenson as a security for a debt.

A creditor's suit having been instituted, after Dewes's death, for the administration of his assets, the lease of the house, with the good-will of the business established in it, was, in 1823, put up for sale under the decree and with the concurrence of Dickenson's executor. Of the term, only three years and one quarter were then unexpired. The lease and the good-will were sold for £1000, which was much less than the amount of the debt due to Dickenson; and the money was paid into court, to abide the result of the claim of the equitable mortgagee.

On behalf of both plaintiff and defendant it was urged, that the equitable pledge extended only to the lease, and not to the good-will of the business carried on in the premises; that the good-will had been expressly included in the sale; that, in fact, the greater part of the purchase-money had been given for the good-will; that, therefore, it ought to be referred to the Master to determine what proportion of the £1000 was to be considered as the purchase-money of the lease, and what proportion of it as the purchase-money of the good-will; and that only the former portion of the fund ought to be paid to the equitable mortgagee.

THE MASTER OF THE ROLLS. The good-will of the business is

nothing more than an advantage attached to the possession of the house; and the mortgagee, being entitled to the possession of the house, is entitled to the whole of that advantage. I cannot separate the good-will from the lease.

HUGHES v. GRAVES.

COURT OF APPEALS, KENTUCKY, 1822.

[1 Litt. 317.]

OPINION OF THE COURT.

PALMER, being indebted to Hughes in the sum of \$346.27, to secure the payment thereof, executed a mortgage upon two slaves by the names of Fanny and Esther; which mortgage was, in due time and in the proper office, admitted to record. Palmer afterwards sold Fanny to Walker, and Esther to Graves; and having failed to pay the debt for which they were mortgaged, Hughes filed his bill against Palmer, Walker, and Graves, praying for a foreclosure of the mortgage, and a sale of the slaves, in satisfaction of his debt. The bill was taken for confessed, at the rules in the office - the rule docket not then having been abolished. Walker afterwards filed his answer, in which he admits that he purchased Fanny; but insists that it was without notice that she was included in the mortgage. The cause was afterwards set for hearing as to Palmer and Walker, and continued on the rules as to Graves. The court, on the hearing, pronounced a decree foreclosing the mortgage and directing a sale of the slave, Fanny. She was accordingly sold for the sum of \$325. Hughes then filed a supplemental bill, in which, after stating the former bill and the proceedings thereon, he alleges that the slave, Esther, when purchased by Graves, was of little or no value, being afflicted with a malady of which she afterwards died; and that the slave, Fanny, subsequent to the execution of a mortgage, had two children, which were claimed by and in the possession of Walker, under his purchase from Palmer, and that he was informed that Walker had sold and removed them to places unknown; and he prays that they may be (if to be had) delivered up to be sold in satisfaction of the residue of his debt remaining unpaid, or that Walker may be compelled to pay. Walker, in his answer to the supplemental bill, controverts the unsoundness of Esther, and alleges her to be of sufficient value to pay the residue of the debt. He admits the slave, Fanny, had two children, one of which was born before, and the other after he purchased her, and that he sent them off by an agent, who sold them for \$150; but states that he is ignorant to whom they were sold, or where they are, and contends that they are not liable to the mortgage; more especially, as Esther had not been sold.

The cause came on to be heard, and the bill, as to Graves, being taken for confessed in court, the rule docket having then been abolished, the circuit court decreed that Graves should pay the balance due to Hughes, after the sale of Fanny, and dismissed the supplemental bill, as to Walker, with costs. Graves afterwards prosecuted a writ of error to this court, and on the ground that there was a defect in the service of process, the decree, as to him, was reversed, and the cause remanded, with leave for him to answer. When the cause was remanded, he answered, and in his answer alleges that Esther was laboring under a disease when he purchased her, of which she afterwards died, and insists upon his being a purchaser without notice, etc.

1. In this situation of the cause Hughes has prosecuted this writ of error, and by his assignment of error questions the propriety of the decree dismissing the supplemental bill against Walker.

There can be no doubt but the slave, Fanny, was liable to the mortgage. Walker having been a purchaser without notice in fact of the mortgage, is an immaterial circumstance; for the mortgage having been duly recorded, the law will presume notice. Besides, the legal title was by the mortgage vested in Hughes, and the want of notice only protects a purchaser against a latent equity, and not against the legal title. Nor can there be any doubt but that the children born of Fanny after the execution of the mortgage are as much liable as Fanny herself is; for it is a settled rule, that the offspring belongs to the owner of the mother — partus sequitur ventrem being a maxim of the common as well as of the civil law; and as Walker has removed the children and sold them to persons unknown, so that they cannot be made specifically subject to the decree of the court, he has unquestionably incurred a personal liability, to the extent of the price he received for them.

2. Esther is, beyond question, as much liable in the hands of Graves, as Fanny and her children are in the hands of Walker, and in proportion to her value, he ought, we apprehend, to contribute to the payment of the mortgage debt. But the liability of Esther and the obligation of Graves to contribute to the payment of the mortgage debt cannot operate to discharge Walker from his liability. The whole and every part of the property conveyed by the mortgage is equally liable to the debt, and must remain so, until the whole debt is paid. The proportion in which Walker and Graves should contribute to the payment of the debt is a matter to be settled between them, but cannot affect the liability of either of them to Hughes. To him, they must each remain liable to the extent of the value of the property he

may have received, until the whole debt is paid. The décrée, therefore dismissing the supplemental bill against Walker, is erroneous, and would have been so, if the decree against Graves for the residue of the debt which remains due had still been reversed; for nothing short of the payment of the money would be a discharge of Walker's liability. Even a judgment at law against one, where several are bound in the same obligation, will not discharge the other; and a fortiori, a decree, in a case of this sort, ought not to be made to have that effect. If the cause had been in a state to be heard properly as to Graves, and the value of Esther were found to be in the same proportion to the residue of the debt remaining unpaid, as the value of Fanny and her children was to that part of the debt which Walker had paid, the court ought, in that case, to have directed the residue of the debt to be paid, part by Graves; and in case of his failure, that it should be paid by Walker, if it should not be more than the price received by Walker for the children of Fanny; and if more than that, he should pay to that extent only; and such should be the decree entered when the cause is remanded. -Decree reversed.

McMURPHY v. MINOT.

SUPREME COURT, NEW HAMPSHIRE, 1827

[4 N. H. 251.]

This was an action of covenant broken on an indenture made the 12th July, 1811, by which the plaintiff demised to Seth Daniels, a certain tract of land to hold during her natural life, and the said Daniels covenanted with the plaintiff to pay her, on the first day of May, annually, a rent of \$30.

The action was brought against the defendant, as assignee of Daniels, for the said rent from 1st May, 1817, to the 1st May, 1825, and was submitted to the decision of the court upon the following statement of facts.

The indenture was made as stated in the declaration, and Daniels having entered under it, afterwards conveyed all his estate to one Gilman Dudley, who, on the 3d April, 1822, conveyed the land to the defendant in fee and in mortgage. Dudley remained in possession and took the profits until his death in October, 1822, and after his decease his administratrix remained in possession, taking the profits until April, 1824. On the 16th April, 1824, a tenant entered

upon part of the land under an agreement with the defendant to pay rent to him in case the land was not redeemed.

On the 23d April, 1825, the administratrix of Gilman Dudley conveyed to the defendant the right in equity to redeem the land mortgaged as aforesaid, and the defendant's said tenant has been in possession of the whole tract from that time to the commencement of this action, on the 22d March, 1826.

All the interest which the plaintiff ever had in the land was an estate for her own life, and the reversion was in Daniels.

RICHARDSON, C. J. It has been urged in behalf of the defendant in this case that the plaintiff is not entitled to recover anything, because the rent was never demanded of Minot. The law on this point is well settled. When a lessor proceeds for a forfeiture or to enforce a penalty he must show a demand of a rent on the very day it was payable. But in an action of covenant no demand is necessary. Remson v. Conklin, 18 Johns. 447; Com. Dig. "Rent," D. 4; Coon v. Brickett, 2 N. H. Rep. 163.

We are therefore of opinion that this objection to the action cannot prevail.

It has also been urged that this action cannot be maintained, because the particular estate and the reversion having become united in the same person, the particular estate is merged and the rent extinguished. Had the rent in this case been incident to the reversion it is clear that this action could not be maintained. York v. Jones, 2 N. H. Rep. 454. But it is well settled that the rent is not inseparably incident to a reversion. Coke Litt. 143 and 47 a; 2 Bl. Com. 176.

Rent may be reserved upon a grant of a man's whole estate, in which case there can be no reversion.

The case of Webb v. Russell, 7 D. & E. 393, which has been cited by the defendant's counsel, does not apply in this case. It was there held that where rent is incident to a particular reversion, when that particular reversion is merged, the rent is extinguished. But in this case the rent was never incident to the reversion. The plaintiff granted her whole estate reserving a rent, and she had no reversion to which it could be incident.

In order to maintain this ground it must be shown that when he who has a reversion takes a lease of the particular estate and covenants to pay rent, such rent is extinguished by the union of the particular estate and the reversion. But this proposition cannot be sustained by any reason or authority, and we are of opinion that this ground of defence fails altogether.

But it is further contended on the part of the defendant that being only a mortgagee he cannot in any event be held liable for the rent until he took possession under the mortgage, and the case of Eaton v. Jaques, Doug. 455, is cited as an authority. But that decision has been long questioned, 7 D. & E 312, and in 1819 the question

came before all the judges of England, and a great majority were of opinion that when a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him and he becomes liable on the covenant for the payment of rent, though he has never occupied or become possessed in fact. Williams v. Bosanquet et. al., 1 Brod. & Bing. 72.

In this state it has been repeatedly decided that a mortgage in fee vests in the mortgagee the whole legal estate; the necessary consequence of which seems to be that such a mortgagee must be liable for the performance of covenants running with the land. And we think in this case the defendant is liable for any rent that became due after his mortgage was executed.

In considering this case, the question occurred to us whether the liability of the defendant could be affected by the circumstance that the rent was reserved upon a grant of the freehold, while the conveyance to him was in fee. But we find that it has been decided that covenant will lie against the assignee of part of an estate for not repairing his part, for it is divisible and follows the land. Congham v. King, Cro. Car. 222; 2 East, 580.

And we are not able to discover any reason why he who takes a larger estate should not be bound by a covenant running with a less estate which is parcel of the larger.

On behalf of the plaintiff it has been argued that the defendant is liable in this action, not only for the rent which has become due since he became owner of the land, but the rent which became due before that time.

The cases which have been cited by the defendant's counsel seem to show that the law is not so.

It is another argument in favor of the defendant, that when the action is against an assignee, it is usual to allege in assigning the breach of the covenant, that the breach happened after the assignment. 2 Chitty's Pl. 191; Lilly, 134; Dubois v. Van Orden, 6 Johns. 105; Carthew, 177; 2 Ventris, 231.

It is said in Woodfall, 274 and 338, that an assignee is liable for rearrearages of rent incurred before, as well as during his enjoyment; but he cites no case in which it has been so decided, and offers no argument in support of the propositions, and we are of opinion that this is not law, and there must be judgment for the plaintiff for the rent which has become due since the 3d of April, 1822.

Judgment for the plaintiff.1

¹ Compare: Williams v. Bosanquet, 1 Brod. & B. 238; Calvert v. Bradley, 16 How. 580; Lester v. Hardesty, 29 Md. 50; Farmer's Bk. v. Mutual Co., 4 Leigh, 69, accord. Astor v. Hoyt, 5 Wend. 603; Eaton v. Jaques, 2 Doug. 455, contra. — Ed.

MOORE & JANNEY v. JONES.

CIRCUIT COURT, UNITED STATES, 1877.

[3 Woods C. C. 53.]

Woods, Circuit Judge. The demurrer is well taken. The currency act, Revised Statutes, section 5, 139, declares that "the capital stock of each association shall be divided into shares of one hundred dollars each and be deemed personal property, and shall be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of said shares."

Now, according to the averments of the bill, Moore & Janney became the transferees of the stock of Jones by transfer on the books of the association. According to the terms of the act such transfer made them stockholders and subjected them to all the rights and liabilities of the prior holder of the shares, among which is that shareholders shall be held individually responsible equally and ratably, and not one for another, for all contracts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.

So far as the bank and the public were concerned, Moore & Janney were the owners of the stock. They were entitled to vote the stock at stockholders' meetings, to draw dividends, and to transfer the stock to whom they pleased. The public were advised by the list of stockholders kept in the office where the business of the bank was transacted (see Rev. Stat., sec. 5210), that Moore & Janney were shareholders to the amount of sixty-five shares. By appearing on the stock book of the bank and upon the list of shareholders required to be posted in the business room of the bank, they assumed the liability of shareholders. Neither the bank nor the public were required to take notice of the private understanding between Moore & Janney and the person from whose name the stock had been transferred. The individual liability falls upon the person who appears on the stock book of the bank by transfer to him to be the owner of the stock. The law organizing the banks seems to place it there. To allow one who, by inspection of the stock book, appears to be a shareholder who has allowed himself to be held out by the bank to the public as a shareholder, to set up secret arrangements between himself and the real owner as a defence to his individual liability for the debts of the bank, would be to make of no avail the individual liability clause of the currency act.

"It is well settled that one to whom stock has been transferred in

pledge or as collateral security for money loaned, and who appears on the register of the corporation as the owner of the stock, is, in the event of the insolvency of the corporation, chargeable as a stockholder for the benefit of creditors." Thompson on Stockholders, sec. 223; Adderly v. Storm, 6 Hill, 624; Rosevelt v. Brown, 11 N. Y. 148; Matter of Empire City Bank, 18 N. Y. 199, 223; Holyoke Bank v. Burnham, 11 Cush. 183; Magruder v. Colston, 44 Md. 349; Crease v. Babcock, 10 Metc. 525, 545; Wheelock v. Kost, 77 Ill. 296; Pullman v. Upton, 96 U. S. 328.

Moore & Janney, so far as the bank and the public were concerned, were to all intents and purposes shareholders and individually liable as such. The demurrer to the bill must be sustained.¹

B. Superiority of the Mortgage Lien.

BOUTELLE v. MINNEAPOLIS CITY.

SUPREME COURT, MINNESOTA, 1894.

[59 Minn. 493.]

COLLINS, J. Although counsel have made much of this appeal in briefs and by oral argument, a statement of the undisputed controlling facts will show it to be an exceedingly simple case. May 11, 1889, Fred. H. Boardman, owner of two lots in the city of Minneapolis, mortgaged them to one Sarah I. Hawley. Later the city authorities duly initiated and carried on proceedings in the manner prescribed by the charter to widen the street on which these lots abutted, a strip along their front three feet wide being required. June 26, 1891, the commissioners duly appointed to appraise the damages for such taking made a report and award, whereby there was awarded to said Boardman as damages to the lots the sum of \$300. This report and award was duly confirmed on July 24, 1891, and the same and the said confirmation have never been vacated, set aside, or modified, and none of the condemnation proceedings have ever been annulled or vacated. In the fall of 1892 the city took possession of that part of the premises condemned and appropriated as aforesaid for public use, and has ever since occupied the same as a street or highway. October 28th of the same year a warrant for the amount so ascertained and awarded as damages was duly drawn by the city authorities, payable to Boardman. Afterwards payment of the amount was demanded by him, and refused, and then the claim was assigned to plaintiff.

Default having been made in the condition found in the mortgage,

¹ Compare: Phené v. Gillau, 5 Hare, 1; In re Moller, 8 Ben. 526; Hill v. Eldred, 49 Cal. 398; Silver Bk. v. North, 4 Johns. Ch. 370; Hoppin v. Buffum, 9 R. I. 513. — Ep.

it was foreclosed by a sale under the power December 5, 1892. The property as described in the mortgage was purchased at the sale by the mortgagee for the full sum due, with all costs and charges. A sheriff's certificate of sale was duly made and recorded, and no redemption was made from the sale within the time prescribed for such redemption. The object of this action was to recover the amount awarded.

By reference to the charter provisions (Sp. Laws 1881, ch. 76, subch. 10) it will be seen that the mortgagee was as much a party thereto and was bound thereby to the same extent, as the mortgagor owner. No appeal having been taken from the order of confirmation made in July, 1891, by the city council, the proceedings were final, and conclusive on all interested parties. It will also be seen that on appropriating and setting apart in the city treasury the amount of the award the city became vested absolutely with the title to the property taken and condemned for any and all purposes, and was authorized to enter upon and take possession of it. The city council appropriated and set apart the money in the city treasury October 28, 1891, when it caused a warrant to be drawn for the amount of the award. It follows that at that time the property taken was devested and released from the lien of the mortgage, and the mortgagee had no further claim upon it; the title had vested absolutely in the city, and it was entitled to and did take possession.

Undoubtedly, the money so appropriated and set apart became collateral security for the payment of the mortgage debt, substituted in lieu of the land taken, and it so remained until the foreclosure sale, December 5, 1892, when the property thus covered by the mortgage was sold for the full amount due, with costs and expenses; and the debt was thereby extinguished. Up to this time the mortgagee had two funds for the security of her debt, the amount of the warrant and the real estate on which the mortgage remained a lien. Resort could have been had to either fund, and if from either she realized her debt a lien upon the other terminated. That at the foreclosure sale the premises were sold, and that in the sheriff's certificate they were described as in the mortgage, is of no consequence, for a part had been as effectually released, by operation of law, as if a partial release had been formally executed and delivered.

Order affirmed.

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TURNER v. MEBANE.

SUPREME COURT, NORTH CAROLINA, 1892.

[110 N. C. 413.]

CLARK, J. The defendant mortgagor moved the house from the mortgaged premises across the road to another tract, also belonging to him but not covered by the mortgage. This certainly could not impair the mortgage lien upon the house. If it could, in these days when house-moving machinery has been so greatly perfected, there would be a serious impairment of the security of all mortgages on improved real estate. The Court decreed a sale of the house in its new situs under the mortgage, with leave to the purchaser to remove, or roll the building off again. We can perceive no grounds, legal or equitable, upon which the defendant can object to this. The plaintiff does not ask for more, and the rights of third parties are not involved.

It does not appear that the building was attached to the freehold, and it is unnecessary to discuss the effect of such attachment in this

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RECTOR OF CHRIST CHURCH v. MACK.

COURT OF APPEALS, NEW YORK, 1883.

[93 N. Y. 488.]

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1881, which reversed a judgment in favor of defendant Rhoda E. Mack, entered upon a decision of the court on trial at Special Term, and directed judgment for plaintiff for the relief demanded in the complaint.

This action was brought to restrain defendants from obstructing the light and air from the windows of plaintiff's church edifice, adjoining a lot owned by said defendant, Rhoda E. Mack. Plaintiff was formerly owner of said lot, which was subject to a mortgage given to one Bell. It conveyed the same to defendant John Mack, subject to the mortgage which the grantee assumed and agreed to pay. By the deed an easement was reserved of light and air to the grantor's church so long as its premises were used for church purposes. Mack conveyed to a third person, who, on the same day, conveyed to Rhoda E., wife of said John Mack. Her deed was made subject to the Bell mortgage, but contained no assumption of the same by her. The holder of the mortgage, at the request of defendants herein, foreclosed the mortgage by suit; plaintiff was made a party defendant therein. Judgment of foreclosure in the ordinary form was entered, and upon the sale under it Mrs. Mack became the purchaser and received the referee's deed. Mrs. Mack thereafter erected a fence upon her lot, which cut off the light from the basement windows of plaintiff's church.

FINCH, J. It is conceded that a purchase under the foreclosure of the Bell mortgage would have given to a stranger to the title an ownership discharged of the plaintiff's easement. That the same result attends the purchase by Mrs. Mack, notwithstanding her relation to the property, follows from the reason upon which the conceded rule is founded. The statute provides that the deed given in pursuance of a sale on foreclosure shall vest in the purchaser "the same estate (and no other or greater) that would have vested in the mortgagee if the equity of redemption had been foreclosed," and further declares that such deeds shall be as valid as if executed by the mortgagor and mortgagee. The construction to be put upon these two provisions was early settled in this court. Brainard v. Cooper, 10 N. Y. 358; Packer v. The Roch. & Syracuse R. R. Co., 17 N. Y. 287. In the last of these cases it was said that where legal title is concerned, a mortgage, which for many other purposes is a mere chose in action, is a conveyance of the land; that the interest remaining in the mortgagor is an equity, and that the foreclosure cuts off and extinguishes that equity, and leaves the title conveyed by the mortgage. It was added that such was precisely the effect of a strict foreclosure, and that in construing the statute its two clauses were to be read in harmony. It was, therefore, decided that when the act says the master's deed "shall have the same validity as if executed by the mortgagor it is not to be taken that the purchaser is to be considered as holding under the mortgagor by title subsequent to the mortgage in a sense which would subject him to the effect of the mortgagor's acts intermediate the mortgage and the foreclosure." While it is clearly the modern doctrine that the mortgagee has by virtue of his mortgage no estate in or title to the land, or the right of possession before or after the mortgage debt becomes due (Ten Eyck v. Craig, 62 N. Y. 421), and only acquires such title by purchase upon the foreclosure sale, yet the character and extent of his title so acquired is described in the statute by a reference to the old rule and the old practice, when the mortgagor's right could be fitly termed an equity of redemption which could be foreclosed, leaving an absolute estate in the mortgagee. The effect of the foreclosure deed, therefore, as determined by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent encumbrances and conveyances of the mortgagor. And thus, while the plaintiff corporation held title to the Mack lot, they held it subject to the

Bell mortgage and to the absolute title into which that mortgage might ripen by a foreclosure and sale. When they sold to Mack, reserving an easement in the lot for light and air to their adjoining windows, they held their easement, and Mack held his ownership, still subject to the Bell mortgage and the absolute title into which it might be turned. Mack had assumed the payment of the Bell mortgage, but conveyed through a third person to his wife, subject to that mortgage, but without any liability for its payment assumed by her. Upon its foreclosure she became the purchaser and took the deed. That vested in her, under the statute provision, the title of the mortgagor and mortgagee unaffected by the intermediate acts of the mortgagor and those succeeding to his interest, unless there be something in her position which subjects her to a different rule.

The statute allowed her to be a purchaser, and in determining the effect of the foreclosure deed its terms draw no distinction among purchasers. It does not discriminate. Whoever may lawfully purchase becomes the purchaser whose title is described and determined, and we have no warrant in the facts to take Mrs. Mack out of the statutory protection.

The argument of the General Term, and of the learned counsel for the respondent on this appeal were both aimed at the result of converting her purchase into a mere payment and discharge of the mortgage lien, and her deed into a release of the encumbrance. The General Term reached the result by a disregard of the first clause of the statute declaring the effect of the deed, and what seems to us a misinterpretation of the second clause. In brief the reasoning was that the deed was to be equivalent to one made by the mortgagor and mortgagee; that the mortgagor had already conveyed and his title encumbered by an after constituted easement had reached Mrs. Mack: that she could not be said to purchase what she already had; that so her deed was only equivalent to one made by the mortgagee, and he having no title, but merely a lien, the foreclosure deed operated only as a release to Mrs. Mack, however it might operate as to a stranger. We deem this reasoning defective in two respects. It construes the statute to transfer the mortgagor's title as it stood, not at the date of his mortgage, but burdened with its after encumbrances and limitations, imposed by him or his grantees; and it assumes what is not true, that Mrs. Mack already had the entire title of the mortgagor, and so could take nothing from him, but only the right of the mortgagee. The mortgagor had the absolute title encumbered only by the mortgage. That title he transferred to the church, but when the latter conveyed to Mack it reserved an easement or servitude, and so parted with less than it received from the mortgagor. This title Mrs. Mack took and, therefore, did not get the entire interest which the mortgagor himself had. There was something which she had not got; which by a foreclosure of the Bell mortgage would pass; and which it was possible for her to purchase. A further ground is stated which is based upon a theory that Mrs.

Mack by virtue of her ownership of the lot came under some obligation to pay off the mortgage, and so could not in equity assert a title founded upon a breach of that obligation. Cases are cited in other States which hold that the mortgagor owes to his mortgagee the duty of paying taxes upon the land, and cannot, by neglecting their payment and causing a sale and then becoming a purchaser, cut off the lien of the mortgagee. If the purchase had been made by Mr. Mack, who had assumed the payment of the mortgage, the question would have arisen. But Mrs. Mack owed no duty of payment either to the mortgagee or to the plaintiff. She assumed no such obligation. She violated no duty and incurred no personal liability by omitting to pay off the encumbrance. was her right and privilege not to do so, and in the omission she did no wrong of which either party could lawfully complain. She had the right to leave the mortgagee to his remedy, and when he asserted it, / the law allowed her to become the purchaser, and made no distinction between her rights and those of a stranger to the title.

It was urged that this view of the case left the plaintiff without any power to save its easement, since on the sale Mrs. Mack could safely outbid all others and beyond the mortgage debt. But the plaintiff should not have waited until the sale. When brought into court as a defendant, and certain to be bound by the decree, it should have sought to modify the decree, and showing the peril of its easement and offering to bid the full amount of the mortgage debt and costs upon a sale subject to the servitude, it should have asked that the sale be so made. The mortgagee could not object since his debt would be paid in full and he had no greater right; and Mrs. Mack could have asserted no equity to have the sale so made as to free her from the easement. But when no limitation or condition is imposed by the decree, and no duty of payment rests on the purchaser, the statute determines the estate which passes by the foreclosure deed.

The judgment of the General Term should be reversed and that of the Special Term affirmed, with costs,

All concur.

Judgment accordingly.

DUVAL v. BECKER.

COURT OF APPEALS, MARYLAND, 1895.

[81 Md. 537.]

McSherry, J., after stating the facts:

It is thus apparent that the question lying at the very root of the controversy is, whether a mortgagor can, before default by his own

act, and without the consent or acquiescence of the mortgagee; and as against the latter, abandon an easement appurtenant to the estate mortgaged, which easement is in express terms included within and covered by the lien of the mortgage, and can by such abandonment so bind the mortgagee that, though upon foreclosure the property and appurtenant easement are sold together as an undivided entirety, precisely as conveyed by the mortgage, yet they are to be treated as so completely severed by the abandonment on the part of the mortgagor as that the easement is in fact extinguished, if the security of the mortgage debt has not been ultimately impaired by such abandonment. The solution of this question, which involves an examination into the extent and nature of the mortgagee's interest and estate, is, we think, free from serious difficulty.

It is true that when the same person becomes the owner of the dominant and servient estates, and there is no intervening or outstanding interest or title held by some one else in or to the appurtenant easement, the unity of the two estates in the one individual necessarily extinguishes and merges the easement appurtenant to the dominant estate, because no person can have an easement in the land which he himself owns. Capron v. Greenway, 74 Md. 289. And it is equally true, that when the same person acquires both the dominant and servient estates, and conveys away the latter without reserving the pre-existing easement to himself, this operates as an abandonment by the grantor of the easement, in so far as it was enjoyed by him, for the reason that a grantor shall not derogate from his own, grant. Mitchell v. Seipel, 53 Md. 269.

But neither an extinguishment in the mode indicated, nor an abandonment by the method just named, can be permitted to operate against a third party claiming an interest in the same easement, even though such third party be merely a mortgagee. The equity doctrine that a mortgage is a mere security for the debt and only a chattel interest has, by a gradual progress, been adopted by the courts of law, and the harshness of the common law, which looked to form only and treated a mortgage after condition broken as in all respects an absolute conveyance, has been materially mitigated. Phelps Juridical Eq., sec. 196. Hence, as stated by Chancellor Kent (4 Com. 160), "except as against the mortgagee, the mortgagor while in possession and before foreclosure, is regarded as the real owner." He has, therefore, an insurable interest in the mortgaged property, Ins. Co. v. Kelly, 32 Md. 421, and may recover damages for injuries done thereto, A. & E. R. R. Co. v. Gantt, 39 Md. 140; Arnd v. Amling, 53 Md. 200; and notwithstanding a default is permitted to redeem in equity, Bank of Commerce v. Lanahan, Trustee, 45 Md. 407. But whatever his relation to the property may be as respects third persons, the doctrine that he is regarded as the real owner of the mortgaged property is subject to the express qualification that the mortgagee is not included. The doctrine applies "except as

against the mortgagee." As between the mortgager and mortgagee, "by the legal, formal mortgage . . . the property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an absolute legal conveyance, but subject to a proviso or condition . . . and upon non-performance of this condition, the mortgagee's conditional estate becomes absolute at law, and he may take possession thereof, but it remains redeemable in equity during a certain period." Bank of Com. v. Lanahan, supra; Jamieson v. Bruce, 6 G. & J. 72; Evans & Iglehart v. Merrikin, 8 G. & J. 39. And in the recent case of Cahoon v. Miers, 67 Md. 576, where the question was whether the offspring born of mortgaged live stock, after the execution of the mortgage, belonged to the mortgagor or to the mortgagee, the late Judge Miller, speaking for this court, said, that our predecessors, in deciding the case of Evans & Iglehart v. Merrikin, supra, rested their conclusion upon the legal effect and operation of the mortgage as between the mortgagor and mortgagee. "They said," continues the opinion in Cahoon v. Miers, "and upon ample authority that a mortgage does something more than merely create a lien for the debt; that upon its execution the legal estate becomes immediately vested in the mortgagee and the right of possession follows as a consequence . . .; that this legal estate is defeasible at law upon the payment of the mortgage debt at the time stipulated, but if this is not done, then it becomes indefeasible at law and defeasible only in equity. . . . From this view of the nature and effect of a mortgage. they say it results that the mortgagee must be considered as having an estate or interest in the subject-matter of the mortgage, not absolute, it is true, because such an estate is not imported by the terms of the instrument, but an interest commensurate with the object contemplated to be attained by it as a security for the payment of the debt." . . . "But at law the title all the while is in the mortgagee. . . . That decision (8 G. & J. 39) has been acquiesced in and recognized as the law of the State for more than half a century, and we see no good reason for overruling it now." As between the mortgagor and mortgagee, therefore, the doctrine that the mortgagor is regarded as the real owner, does not, and in view of the quality of the estate conveyed by the mortgage, cannot obtain to the extent of permitting the mortgagor by his own act to exempt from the lien and operation of the mortgage any part of the mortgaged property. It gives him no authority to dismantle the mortgaged estate of its appurtenant easements, and no power to force the mortgagee to accept as security for the payment of the debt, anything less than the entire estate originally granted. After the mortgage has been executed and delivered, and the security it was intended to afford has been accepted, it does not lie within the power of the mortgagor to withdraw or to cut out from the lien thus created any portion of the property actually conveved. A contrary doctrine as between the mortgagor and mortgagee would jeopardize, if it did not wholly destroy, the stability of every

mortgage security; and there is neither principle nor precedent to justify its adoption. It would lead to endless confusion, and would cause the mortgagee's lien, whose range and latitude ought to be fixed by the mortgage itself, to depend in a large measure upon, and to be guaged as to its scope by, the accidental circumstance that the property as stripped of its appurtenant easements might happen to sell, when sold under foreclosure, for sufficient to pay the mortgage debt, instead of allowing the lien to cover during the whole period the mortgage remains in force the precise property originally conveyed.

Judgment for the plaintiff.

SPENCER v. WATERMAN.

SUPREME COURT OF ERRORS, CONNECTICUT, 1870.

[36 Conn. 342.]

 $\ensuremath{\mathtt{Bill}}$ in Equity; brought to the Superior Court and heard before Minor, J.

The petition alleged that the respondent Waterman, on the 4th of April, 1866, mortgaged to James Jennings, another of the respondents, a piece of land in the town of Danbury of which he was the owner in fee, containing half an acre with buildings thereon, to secure a debt of \$250; that the petitioner on the 29th of August, 1868, levied an execution which he held against Waterman on the equity of redemption in the mortgaged premises and had an undivided portion of the same set off to him according to law, the whole premises being appraised by the appraisers legally appointed at \$639.50, and such proportion being set off to him as an undivided interest as \$49.83, the amount of his execution, bore to the value of the whole; alleging that the premises were so situated that they could not be divided, and praying that they might be sold under an order of the court and the proceeds divided among the parties interested.

The respondents demurred to the petition, and the Superior Court held it sufficient and passed a decree that the premises should be sold by a person appointed for that purpose, and that a return of the sale should be made to the court for its further order with regard to the proceeds of the sale. The respondents filed a motion in error and brought the record before this court for revision.

Other facts were alleged in the petition and found by the decree which are unimportant in the view of the case taken by the court.

PARK, J. We think there is manifest error in the judgment of the Superior Court.

The petitioner by the levy of his execution took only the interest of the mortgagor in the mortgaged premises so far as his execution covers the mortgaged property, and therefore the case stands precisely as it would have stood if this controversy was between the mortgagor and the mortgagee. We then have the novel proceeding of a party standing in the place of a mortgagor, bringing a petition to divide or sell the mortgaged premises, against the will of the mortgagee, and contrary to the express stipulations of his deed.

It is manifest that the land cannot be divided, for the mortgagee has the right to the whole as security for his claim, and he cannot be compelled to take a portion of the land in payment, for he has the right to the whole unless his claim is paid in money. The statute is conversant about rights that may be divided, and not about those which are incapable of division; and a sale is allowed only in cases where the interest of all the parties concerned would be more promoted by a sale than by a division. Therefore rights incapable of being divided are incapable of being sold.

Furthermore the mortgagee, by the terms of his deed, cannot be compelled to relinquish the mortgaged property till his debt is paid; but this proceeding would compel him to do it on the promise that his debt would be afterwards paid. Suppose the property should not sell for more than half enough to pay his claim, must the sale be stopped, when once ordered by the court; or must the decree of the court be conditional, that the property should sell for enough to pay the mortgage claim?

Again; if the mortgager, or those standing in his place, can sustain a petition against the mortgagee, to sell the mortgaged property, no doubt the mortgagee might sustain a like petition against the mortgager, or those representing his interest, and we should have the novel practice of proceedings of this kind in lieu of petitions of foreclosure; which would be contrary to the stipulation of mortgage deeds, and contrary to the law regarding real estate. If a party seeks to obtain satisfaction for his claim from real estate, he must take it in payment of his debt, or at least so far as the value of the land extends.

These considerations show that there is manifest error in the judgment complained of, and it is unnecessary therefore to consider the other questions made in the case.

The judgment is reversed.

In this opinion the other judges concurred.

OLYPHANT v. ST. LOUIS ORE & STEEL CO.

CIRCUIT COURT OF UNITED STATES, 1885.

[23 Fed. 465.]

Brewer, J. (orally). In the case of Olyphant against Ore & Steel Co., where a demurrer has been filed by the trustees of the first mortgage, a mortgage given by the old Vulcan Company upon its plant in south St. Louis, the facts are that in 1875 the Vulcan Company owning the plant here in south St. Louis, executed a million dollar mortgage to Edgar and Lackland, trustees. That mortgage covered its property, and it had but this property. The bonds secured by that mortgage become due on the fifteenth of next month. The interest due last fall is unpaid. Some years after that mortgage had been given, the mortgagor consolidated with the owner of some mining properties, thus forming the "Ore & Steel Company." That consolidated corporation bound itself to pay the mortgage on this south St. Louis plant. After the consolidation, a mortgage was given to the Farmers' Loan & Trust Company, a New York corporation, on the entire properties. Subsequent thereto a mortgage was given to Messrs. Olyphant and Hitchcock on the properties, excluding the property in south St. Louis. upon which the old Vulcan mortgage was given. So it stood in this condition: The Farmers' Loan & Trust Company had a mortgage on all the properties, a mortgage subsequent to the Lackland mortgage on the property in south St. Louis, and prior to that to Olyphant and Hitchcock on all except the south St. Louis properties. Now, while the mortgagees in this first mortgage are not necessary parties, yet it would seem to us that they were proper parties; that the Farmers' Loan & Trust Company mortgage is a connecting link that binds the interests all together; for, when this Vulcan property is sold to pay its first mortgage, if there be a deficiency, whether that deficiency stands as an indebtedness against the other property, subordinate to the mortgages already existing thereon, or prior thereto, is a question which of course ought to be determined, and will affect the value of these mortgages and the property sold. So, as far as the demurrer is concerned, we think it may be properly overruled. But the question that lies back of that, perhaps the real and substantial question in the case, is whether these first mortgagees of the south St. Louis property should be delayed in the foreclosure of that mortgage, and compelled to abide the sale of the entire properties, and as an entirety.

Generally speaking, if a mortgagee loans money on a single piece of property, he has a right when default comes to have that property by itself sold, and for obvious reasons. Take the case at bar. Here is a mortgagee who loans a million of dollars on manufacturing property. Default has occurred. Why should he not be at liberty to foreclose

his mortgage on that property on which he made his loan, if it fails to pay his debt? He may say, "I will take that property." Why should he be compelled to put his hands in his pocket and advance two or three millions more to buy other properties, which he may not want, which he never loaned his money on, and which he had no thought of at the time he made his loan? He dealt with the mortgagor owning the particular piece of property; he made his loan upon that particular piece of property; and now says to the mortgagor, it not paying: "I want the property sold; if I have to buy it in, well and good. At any rate, I don't want to be mixed up in the other matters, and have that property put up for sale with a large bulk of property which I may not be able to buy, and which I might not want to buy if I was able." It seems to us that he would have such a right as that, unless, of course, as Mr. Allen suggested, there may be equitable reasons estopping him from insisting on such right. In the case at bar, the bondholders, represented by the mortgagee in the first mortgage, may have so conducted themselves at the time of consolidation in respect to it that there may be equities against their apparent present right. there be such equities, they are not now disclosed to us. It stands before us simply upon the fact that here is a mortgage upon a single property, given before any other properties belonged to the mortgagor, which has come to default, and which the mortgagee says he wants to have sold to pay the debt.

It has appeared incidentally, in the course of this litigation, that some of the principal bondholders in this first mortgage — this Vulcan mortgage - have mining properties, or ore properties, which are in interest antagonistic to the ore properties which belong to this consolidated company. So be it. I do not see any equitable reason, in that, why they should not have this manufacturing property on which they loaned sold. Very naturally, if they have ore properties, they may say: "We don't want any of the ore properties of this Ore & Steel Company. All we do want is this manufacturing property, and that we loaned our money on, and that we can, if we buy, unite with our ore properties, and thus make those properties valuable." So, whatever conflict of interest there may be between the ore properties now held by the Ore & Steel Company and those owned by the bondholders in the original Vulcan mortgage furnish no ground for saying, "You cannot buy this manufacturing property without you buy the entire properties subsequently accumulated by the mortgagor." Hence, we say while the demurrer to the bill is overruled, there is also a petition for leave to foreclose that prior mortgage speedily, and the order will be that, unless by the eighteenth of April reasons are shown which make it inequitable, - something which raises what you may call an equitable estoppel on the mortgagees, - they will be permitted to proceed with the foreclosure of that separate mortgage upon the Vulcan property, - the south St. Louis property; such foreclosure and sale to be subject to the order of the court, in order that there may be nothing

done which will go against the equities of any of the parties connected with this Ore & Steel Company. Whatever may be said, as was said by counsel, as to the default in interest last fall having been brought about by the action of these bondholders in issuing attachments and other proceedings, even assuming they were guilty of wrong in that, now the principal is due, and certainly they ought not to be deprived of or postponed as to that because of any interference which they may have been guilty of in respect to the mere matter of interest six months ago.

FULLER v. BRADLEY.

SUPREME COURT, MASSACHUSETTS, 1839.

[23 Pick. 8.]

WHILE the foregoing action was pending, the tenants presented a petition, representing that they were the owners, under some of the above mentioned deeds, of one undivided half of a parcel of the same land, subject to the mortgage to Bradley, and that Bradley was the owner in fee simple absolute of the other half, and praying for partition.

Per Curiam. The present question is, whether the petitioners can have partition against the respondent as against a stranger. Bradley is the absolute owner of one half of the land, and mortgagee of the other half, and the petitioners are assignees of the mortgagor. The Court are of opinion, on this general question, that the petitioners cannot have partition. They stand as mortgagors. Then can a mortgagor of one undivided moiety have partition against his mortgagee who is the absolute owner of the other moiety? We are of opinion that he cannot. Whether the petition for partition be regarded as a real action, in which the title is drawn in question, or as a suit for possession, it is an adversary suit, and the mortgagee has both the legal title and the right of possession, as against the mortgagor, and those who claim under him. A bill to redeem is the proper remedy, and after redemption a petition for partition may be sustained.

Petitioners take nothing, &c.; costs for respondent,

MOORE ET AL. v. LITTLE ROCK.

SUPREME COURT, ARKANSAS, 1883.

[42 Ark. 66.]

SMITH, J. The object of this suit was to enjoin the collection of city taxes on a quarter section of land adjacent to the city, but wholly unimproved, according to the uncontroverted averments of the bill. The plaintiffs were two married women, non-residents of the State. In the latter part of the year 1870, or beginning of 1871, they had sold and conveyed the land to Alexander McDonald, and had taken a mortgage back for the purchase money. This mortgage was in good form, properly executed and acknowledged, and duly recorded. Afterwards, upon an extension of time for the payment of the purchase money, McDonald executed a new mortgage, but the acknowledgment of this was defective.

In 1872, McDonald and one Wheeler, who had in the meantime acquired an interest in the property from McDonald, conveyed it in trust to John W. Faust as trustee, to lay it out in lots and blocks. And in 1873, Faust, by bill of assurance, laid the land off as McDonald and Wheeler's Addition to the City of Little Rock, and donated the streets to the public.

The purchase money not having been paid, the plaintiffs filed their bill and obtained a decree of foreclosure, and at the sale bought the land in.

Upon the final hearing, the Chancellor held that the land was within the corporate limits of the City of Little Rock, and dismissed the bill for injunction.

No doubt causing the land to be laid off as an addition, and subdividing it into lots and blocks, was a dedication of the intervening streets and alleys, so far as McDonald, or any title derived from him, is concerned. The statute declares the legal effect of such acts, when done in relation to territory contiguous to a city of the first class, to be annexation. Gantt's Digest, sec. 3317; Act of March 9, 1875, sec. 94; City of Little Rock v. Parish, 36 Ark. 166.

But could a dedication by McDonald affect the plaintiffs' mortgage? A dedication must be by the owner of land or of an estate therein. If a mere intruder upon this land had attempted to lay it off as an addition, the true owner would not be bound. And the dedication of the owner of a particular estate will not bind the remainder-man, when the estate comes into his possession. 2 Smith's Lead. Cas. [90], notes to the case of Dovaston v. Payne.

And a dedication by an agent without authority would not bind his principal.

Now a mortgagor is, for most purposes, regarded in equity as the beneficial owner. But he can do nothing to diminish the security.

And the mortgagee is not affected by his acts in passing any right of his in the premises to third persons. Thus, if he conveys the land, his grantee takes only an equity of redemption. If he confesses judgment, the lien which his creditor obtains is subject to the mortgage. If he gives a lease or a license, the mortgagee need not respect it after he gets possession upon foreclosure.

It is plain McDonald could not have dedicated the whole tract, as for a park or pleasure ground, to the prejudice of plaintiffs. Neither could he dedicate, let us say, one-fourth of it for streets and alleys, so as to bind them. The plaintiffs had a right to the whole premises as security for their debt. They could not be compelled to take three-fourths of the land as payment. A foreclosure sale under a mortgage to secure the purchase money avoids a previous dedication by the mortgagor, and a purchaser at such sale buys free from it. Hague v. Inhabitants of West Hoboken, 23 N. J. Eq. 354.

The defect in the certificate of acknowledgment is a matter with which the city has not the remotest concern, and of which it can take no advantage. It was not a purchaser for value. Masten v. Halley, 61 Mo. 196; Bishop v. Schneider, 46 Ib. 472.

The payment of city taxes for 1875 and 1876, and of State and county taxes for the four following years, upon the land, under the description of "N. W. & of Sec. 9, T. 1 N. R. 12 W., being all of McDonald & Wheeler's Addition to the City of Little Rock," are considered as acts of ratification and acquiescence of too slight and indecisive a character to affect the result.

The decree is reversed and an injunction will be awarded here.

RE GORDON.

QUEEN'S BENCH DIVISION, 1899

[61 L. T. N. S. 299,1]

CAVE, J. I am of the same opinion. The question we have to decide is, whether the bankruptcy trustee or the respondents are entitled to certain crops. The law is clear. If a mortgagee of land, gains lawful possession of the land he is entitled as against the mortgagor and his trustee in bankruptcy to the crops on the mortgaged land. Inat being so, three points are raised: First, it was said the second mortgagees never took possession on June 25, and the agreement on that day merely referred to the mode of dealing with the crops of the meadow land, it being then unknown who was entitled to them. The second point was, Was this a lawful or unlawful possession? Assuming it was lawful, they are entitled to the hay - it is clear the possession under the deed was lawful. A man mortgages by a first mortgage, he has then left in himself a precarious right which he gives to a second mortgagee subject to the first mortgage; that gave the second mortgagees every right except so far as the principal rights were gone to the first mortgagee. They may take possession subject. to the first mortgage, and the result of that is they get the crops arriving at maturity after taking possession. The third point was, it was said, whatever is the possession in an ordinary case, in this case the trustee had previously taken possession, and therefore the mortgagees were in contempt, and their possession unlawful. the County Court judge must have come to the conclusion that the trustee had not taken possession, and I think he was right. trustee had no interest in the land itself as it was mortgaged, and his taking possession could not affect the rights of the mortgagees. The only effect of it would be that so long as the mortgagees did not take possession there must be a crop which would have gone to the mortgager, and on bankruptcy would go to the trustee. There was no evidence that the trustee ever took possession of the land as distinguished from the personal chattels; he took the chattels, and had them realized as a matter of prudence. I should have imagined he could not have taken possession of the realty, and I think he did not. I think the County Court judge was right; the trustee had never taken possession.

¹ Only one opinion is printed; it sufficiently states the facts. — Ed.

C. Priorities between Mortgage. Liens.

LAMB AND WIFE v. MONTAGUE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1873.

[112 Mass. 352.]

Colt, J. The plaintiffs Lamb and his wife have a homestead, and the wife in addition has an inchoate right of dower in real estate subject to a mortgage given by them, of which the defendant Montague has become the assignee. They offer to pay the whole amount due, and ask that the mortgage may be assigned to them so as to continue security for the amount paid.

The bill was brought originally against Montague and against Smith, then and now owner of the equity of redemption in the mortgaged premises, by purchase from Lamb's assignee in bankruptcy, subject to these rights of dower and homestead. It alleges a willingness to pay the mortgage, and asks that the defendant Montague may be required to assign the same for the plaintiffs' security. The answer of Montague denies the plaintiffs' right to an assignment, and states his readiness to accept the amount due and discharge the mortgage. And the only question is whether such an assignment can be required.

The right of the plaintiffs as owners of a homestead, and of the wife by virtue of her inchoate right of dower, to redeem the mortgaged estate is settled. Davis v. Wetherell, 13 Allen, 60. This right is the right to redeem the entire estate included in the mortgage, by the payment of the whole debt due upon it. The mortgagee is not obliged to take his pay by instalments, or to release any specific portion of the estate on part payment. The whole estate is security to him for the whole debt; and he will have done his whole duty by releasing his interest on receiving payment. He is not required to adjust or regard the equitable rights to contribution, which may exist between parties having different interests in the equity, or to protect them by transferring his title to any one. When such rights exist, they are protected on those settled principles of equity by which one who assumes more than his share of the common burden is subrogated to the rights of the mortgagee, to hold without any assignment or act of transfer as quasi assignee, for the purpose of compelling contribu-He becomes in effect the assignee of the mortgage for the purpose of enabling him to compel a contribution. But the right to subrogation arises by operation of law only where there has been a judgment and extinguishment of the mortgage by one entitled to redeem. An assignment implies the continued existence of the debt, and the equitable right does not arise. Gibson v. Crehore, 5 Pick. 146, 152; McCabe v. Bellows, 7 Gray, 148; Butler v. Taylor, 5 Gray, 455; Ellsworth v. Lockwood, 42 N. Y. 89, 98; Hubbard v. Ascutney Co., 20 Vt. 402, 405; Robinson v. Leavitt, 7 N. H. 73, 100.

Upon the grounds thus stated, the plaintiffs fail to establish a right to an assignment, and are therefore not entitled to the specific relief prayed for against Montague. But the bill may still be maintained against him as a bill to redeem. And the plaintiffs may take the usual decree in such cases for redemption, on payment of the sum due with costs. Gen. Sts. c. 140, § 21; Lamson v. Drake, 105 Mass. 564.

Upon the question whether the plaintiffs are entitled to recover the whole of the sum or any part thereof by way of contribution, we express no opinion. The other defendant Smith was, by the consent of parties in an early stage of the case, "discharged without costs and without prejudice," and no decree can be here made which will bind him in the premises. If the mortgage is redeemed, these questions, if not adjusted, may arise in future litigation between the parties. George v. Wood, 9 Allen, 80.

Decree accordingly.

CONVERSE v. WARE SAVINGS BANK.

Supreme Court, Massachusetts, 1890.

[152 Mass. 407.]

CONTRACT to recover the surplus proceeds of a mortgage sale. Phineas Beaman, summoned in under the St. of 1886, c. 281, appeared as claimant of the fund. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on agreed facts, which appear in the opinion.

W. ALLEN, J. The substance and effect of the agreed statement is this. One Harvey mortgaged land to the Ware Savings Bank to secure the sum of \$2,800, he afterwards mortgaged a parcel of the mortgaged land to the plaintiff by warranty deed, making no mention of the mortgage to the savings bank, to secure the sum of \$700, and he after-

wards mortgaged the whole land with other land to the elaiment, expressly subject to the mortgage to the savings bank. The plaintiff duly foreclosed his mortgage by sale, at which he was the purchaser for \$10. Afterwards the savings bank foreclosed its mortgage by sale and has a surplus of \$206.35 in its hands from the proceeds of the sale, for which surplus this suit is brought. The only question between the plaintiff and the claimant is whether the plaintiff is entitled to the whole of the surplus, or whether it is to be apportioned between him and the claimant.

The case falls within the well settled rule, that if a mortgagor conveys a parcel of the mortgaged premises with covenants of warranty, neither he nor his subsequent grantee of the rest of the land with notice actual or constructive of the prior deed can, upon paying the mortgage, have contribution from the prior grantee. George v. Wood, 9 Allen, 80, and cases cited; Beard v. Fitzgerald, 195 Mass. 134; Clarke v. Fontain, 135 Mass. 464. The plaintiff is entitled to the whole of the surplus.

The defendant bank objects that the judgment, which was for \$220.79, was for too large a sum. The agreed facts state that the claimant was summoned, and appeared under the statute, and that "the surplus in the possession of the bank is \$206.35." It is not stated that the amount had been paid into court, and it appears that it had not, for the bank continued a party to the suit. As the bank has not paid the money into court, the suit will go on against it to final judgment, and there should be interest upon the amount to the date of the judgment, as if there had been no petition that the claimant should be summoned in. St. 1886, c. 281. The case stated does not express any date from which interest should begin to run, but we think that the meaning is, that the sum stated is the amount that was in the possession of the bank at the commencement of the action, and that the proper amount of the judgment upon the agreed facts is the sum stated, with interest upon it from the date of the writ. The judgment appears to have been for that amount.

Judgment affirmed.

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EYRE v. BURMESTER.

House of Lords, 1862.

[10 House of Lords, 90.]

THE LORD CHANCELLOR (LORD WESTBURY). My Lords, the facts material for the decision of this appeal are few, and may be shortly stated. In October, 1854, the late Mr. John Sadleir made a mortgage to the appellant, Mr. Eyre, of certain states in Freland, to secure the

payment by Sadleir to Eyre of considerable sums of money. Afterwards, and in September, 1855, John Sadleir, being very largely indebted to the London and County Joint Stock Bank, conveyed these estates and other large estates in Ireland to the respondents, who represent the bank to secure such debt and further advances then made by the bank to Sadleir. No mention was made by Sadleir to the respondents of the fact of the mortgage to Eyre; but the estates in question were conveyed by Sadleir to them as free from any encumbrance. Before this mortgage to the bank was completed by registration of the deeds in Ireland, the fact of Eyre's mortgage was discovered by the agents of the respondents, who therefore refused to allow the arrangement between Sadleir and themselves to remain unless he obtained a release from Euro of the estates in question. This Sadleir engaged to do; and he prevailed upon Eyre to execute a deed of reconveyance to Sadleir himself of these estates, in consideration of Eyre's receiving from Sadleir other securities of equal or greater value. The substituted securities consisted chiefly of a large number of shares in the Royal Swedish Railway, and of a promissory note for £12,000 expressed to be made and signed by Mr. Dargan. But the shares were fictitious, having been fabricated by John Sadleir for the purpose, and the promissory note was a forgery. An actual fraud of a gross and criminal character was therefore committed by Sadleir upon Eyre; and by means of that fraud the release of Eyre's mortgage was obtained.

The release was contained in a deed dated the 5th, but executed on the 13th of October, 1855. By it Mr. Eyre reconveyed, granted, released, and confirmed unto John Sadleir the estates comprised in the mortgage deed of October, 1854. No consideration for this reconveyance is expressed in the deed itself, but the real agreement between the parties is contained in a contemporaneous agreement of the 6th of October, 1855.

After the execution of this deed of reconveyance to John Sadleir no further conveyance was made by Sadleir to the respondents. They were assured of the fact of the reconveyance, and the mortgage was either completed or allowed to continue. The estate so reconveyed by Eyre remained in John Sadleir until he committed suicide in the month of February, 1856. On that event, the fraud of Sadleir was discovered.

These estates have been since sold by an order of the Encumbered Estates Court in Ireland. With respect to the proceeds of that sale, a contest has arisen between Eyre and the London and County Bank; Eyre claims the benefit of his original mortgage, and insists that the reconveyance is void for fraud. The bank directors claim the benefit of the reconveyance as purchasers for valuable consideration, without notice of the fraud committed by Sadleir on Eyre, and on that ground the court below has given judgment in their favor.

A purchaser for valuable consideration without notice will not be deprived by a court of equity of any advantage at law which he has fairly obtained for his protection. But in the present case the estate

reconveyed by Eyre remained in Sadleir, and was never conveyed by Sadleir to the bank. In answer to this objection, the respondents insist on the estoppel created by the previous conveyance. This answer would be good as against Sadleir and all claiming under him. The estoppel created by the antecedent contract and conveyance by Sadleir would bind parties and privies, that is, Sadleir and those claiming under him. But the claim of Eyre is against Sadleir by paramount right, to recover the estate of which Eyre had been deprived by fraud, and Sadleir acquired no interest to feed his prior contract by virtue of that fraudulent transaction.

It is urged by the respondents that the reconveyance when made by Evre enabled Sadleir to obtain money from the bank, and that the mortgage was completed on the faith of the reconveyance. The evidence does not appear to me to prove either of these positions. But granting that it does, the reconveyance was to Sadleir and was obtained by him by fraud and covin. There was no contract or direct communication between the respondents and Eyre, who acted with perfect bona fides. The respondents left Sadleir to obtain the reconveyance, and they can claim the benefit of it only under Sadleir, whose act they must take as it is. If (which is not proved) they had advanced money to Sadleir on the faith of the release and their actual possession of it, but without taking a conveyance, they might have had a lien on the deed itself; but their interest in the estate being equitable only would still, in my opinion, have been subject to the superior equity of Eyre. Whilst the estate remained in Sadleir, so long was it liable to be pursued and recovered by Eyre. But there is no sufficient proof of any such advance by the bank; and the only foundation of the bank's claim is the mortgage by Sadleir prior to the deed of reconveyance. That mortgage and contract would bind any interest subsequently acquired by Sadleir. But under the reconveyance he obtained none; for, as between Sadleir and Eyre, the latter was still the owner, and might at any time during the life of Sadleir, by bill in equity, have set aside the release, and obtained a reconveyance of the estate, and an interim injunction to restrain any alienation of it by Sadleir. This equitable title still remains unimpaired, and ought to be preferred to any claim by the bank.

I therefore advise your Lordships that the orders of the court below be reversed, and that it be declared that the claim of the appellant to priority in respect of his mortgage ought to have been allowed; and that the case be remitted, with that declaration, to the Landed Estates Court. If the appellant has obtained any additional security under the agreement of the 6th October, 1855, not comprised in his original mortgage, that must be given up or accounted for to the bank.

CLARK v. MUNROE.

SUPREME COURT, MASSACHUSETTS, 1817.

[14 Mass. 351.]

This was a writ of dower, which was tried, at the last April term in this county, before Jackson, J. The facts in the case shortly were, that James Andrews and his wife, on the 7th of May, 1805, conveyed the premises, of which the derendant claims to be endowed, to William Clark, her late husband; and that the said William, by his deed, dated and executed at the same time, mortgaged the same premises to one James Winthrop in fee; both which deeds were acknowledged and recorded at the same time; that the said James Winthrop was then the guardian of one Charles Winthrop, a minor, to whom he afterwards assigned them; that the said Charles afterwards entered and foreclosed the said mortgage, and assigned the premises to the present tenant.

It was also in evidence that the consideration of the said deed from Andrews and his wife to said Clark was the property of the said Charles Winthrop, and that the said mortgage was made in pursuance of a previous agreement between all the parties to both deeds, to secure the said consideration for the use and benefit of the said Charles.

The judge directed the jury that, in consequence of the said agreement, and the execution of said deeds pursuant thereto, the said William had only such an instantaneous seisin as would not entitle the demandant to recover her dower in the said premises.

The demandant excepted to this opinion of the judge, and the cause came before the court at this term upon the said exception.

PER CURIAM. In the case of Holbrook v. Finney, 4 Mass. Rep. 566, it was decided that a conveyance in fee, and a reconveyance by the grantee to the grantor in mortgage, being considered as parts of the same transaction, did not give to the grantee such a seisin as entitled his wife to have dower in the granted promises. In the case at bar, the mortgage was to a third party; but still the whole constituted but one transaction. We are not able to view the case in any light different from what it would have presented had the mortgage of Clark been made to Andrews and his wife instead of Winthrop. Coates v. Cheever, 1 Cowen's Rep. 460.

Judgment for the tenant on the verdict.

HAMLIN v. KLEIN.

SUPREME COURT, NEW YORK, 1896.

[8 N. Y. App. Div. 413.]

This action was brought by the plaintiffs, who are the holders, by assignment, of a certain mortgage described in the complaint, to vacate a release of lands from the lien of their mortgage, and to restore such lien as to the lands described, upon the ground that the plaintiffs were induced to execute such release by reason of the fraudulent representations of the mortgagor.

ADAMS, J. The learned trial court found, as facts in this case, that the release of the plaintiffs as to the five lots in question was induced by the false and fraudulent representations of the mortgager's treasurer, and that none of said lots was, by the terms of said mortgage, entitled to be released from the lien thereof; and his conclusion of law was, that the plaintiffs should be restored to the same rights in all respects as against the defendants Klein and Vorreuter, and as to all collateral security held by them, as they would have possessed had the release in question never been executed, so far as the same purported to discharge from the lien of the mortgage the five lots which were fraudulently embraced in such release.

The facts thus found appear to be fully sustained by the evidence in the case and are apparently acquiesced in by the principal debtor, as no appeal has been brought from the judgment herein, save by the defendants Klein and Vorreuter, who stand in the relation of sureties to the mortgage debt. And the only question, therefore, which is necessary to be considered upon this appeal, is whether or not the release from the lien of the plaintiffs' mortgage of these five lots, which unquestionably did materially impair the security of such mortgage, exonerated the sureties from any liability for the amount remaining unpaid upon the principal debt.

It is, of course, well settled that where a creditor by a valid agreement entered into between himself and the principal debtor, without the consent of his surety, releases the former from the payment of his obligation, or any part thereof, or releases any property of the principal debtor which the creditor holds as security for the payment of the debt, the surety is thereby discharged. It is likewise an elementary principle of law that fraud vitiates all contracts; and it follows that where a party is induced to enter into an agreement by reason of fraudulent representations made to him, the same is absolutely void, and the surety is not discharged from his obligation to answer for his principal by reason of the agreement thus entered into. Lowman v. Yates, 37 N. Y. 601.

The rule just stated may be applied with peculiar appropriateness to the case in hand, for the acts of the creditor which will ordinarily exonerate a surety, must be of such a character as to work some legal injury to him, or they must be inconsistent with his legal rights. Blydenburgh v. Bingham, 38 N. Y. 371; Clark v. Sickler, 64 N. Y. 231.

Of course, to the extent that the release of the five lots impaired the security of the principal debtor which was held by these plaintiffs, the sureties were injuriously affected; but when the relief sought to be obtained through the medium of this action is accomplished and the lien of the mortgage is restored to those lots, the sureties will be placed precisely where they would have been had those lots not been included in the release. In other words, nothing has been done by these plaintiffs, except that which they are now seeking to avoid upon the ground of fraud, which injuriously affects the legal rights of the appellants. is quite possible that the land covered by the mortgage has depreciated in value, as the defendants attempted to show upon the trial; but it is difficult to see how that fact can be made available as a defence to this action, inasmuch as the plaintiffs' mortgage is not yet due and there has been no default in the interest thereon which would have permitted them to foreclose the same. So that, with the lien restored to these five lots. the sureties will simply remain liable to respond for any deficit which may possibly arise if the plaintiffs should ultimately be forced to foreclose their mortgage, and that is precisely what they undertook to do when they assumed the obligation of sureties to the principal debtor.

We are unable to discover any error committed upon the trial of this case, or in the conclusion reached by the learned trial court; and we, therefore, think that the judgment appealed from should be affirmed.

All concurred, except WARD, J., not sitting.

Judgment affirmed, with costs.

PERKINS v. DAVIS.

SUPREME COURT, MASSACHUSETTS, 1876.

[120 Mass. 408.]

WRIT OF ENTRY to recover possession of a parcel of land in Lawrence. Plea, nul disseisin. At the trial in the Superior Court, before BRIGHAM, C. J., without a jury, the following facts were found:

In April, 1869, the demandant, who then owned the demanded premises, and Sarah O. Adams, made an oral contract for the sale and purchase of them, and Adams entered into possession and so continued until January 1, 1870, and on June 12, 1869, the demandant

executed and delivered to her a deed, in which the consideration was stated to be \$3,200, and she executed and delivered to him a mortgage deed of the premises, in which the consideration was stated to be \$2,900. Both of these deeds were dated April 22, 1869, and acknowledged and recorded on June 12, 1869. They were so dated because the contract for the sale and purchase of the premises was then made, and with a view to the taxation of the estate. On April 29, 1870, the demandant foreclosed the mortgage made to him by Adams, for a breach of the condition thereof.

While Adams was in possession of the premises, in May, 1869, she made a contract with one Henry J. Couch, to repair or enlarge the buildings on the demanded premises, and Couch performed labor and supplied materials for those purposes, beginning in May, 1869, and ending on March 1, 1870. On March 2, 1870, he filed in the office of the clerk of the city of Lawrence a certificate of such contract, performance of labor and supply of materials, and of his intention to claim a lien therefor on the demanded premises; and on June 30, 1870, on a petition duly filed in the Superior Court to enforce the lien, judgment was entered for the petitioner, and a sale of the demanded premises was ordered, to satisfy the judgment. On August 27, 1870, under this order, the premises were sold to the tenant, and a deed made to him the same day.

On these facts and their legal effect, the judge ruled that the demandant was entitled to recover, and ordered judgment for him; and the tenant alleged exceptions.

AMES, J. As, by the consent of the parties, this case was tried by the court without a jury, the rulings of the presiding judge upon matters of law only are open to examination in this court; but his findings upon matters of fact are conclusive, and cannot be here revised. It appears from the bill of exceptions that the conveyance of the lot of land from this demandant to Sarah O. Adams, and her mortgage deed of the same to him for what appears to have been about nine-tenths of the purchase-money, both occurred on the same day, and were acknowledged and recorded on the same day. This fact is an indication that the two instruments really constituted but one transaction; and the presiding judge may be supposed to have found that (as against the mortgagee) they gave to Mrs. Adams only an instantaneous seisin, so that all encumbrances to which she could subject the property would apply only to her equity of redemption. There is nothing in the facts reported that justifies us in holding that the grantor was to advance money, or give credit on the sale, to enable her to build a house on the land. The case therefore does not come within the rule laid down in Hilton v. Merrill, 106 Mass. 528. The deed, although dated back, could only take effect from its delivery, which was after the date of the building contract. But the difficulty with the tenant's case lies in the nature and extent of the title which Mrs. Adams acquired by the conveyance in the land conveyed. We must suppose

that the deeds exchanged by the parties were in conformity to the terms of their unwritten contract. If, under the conveyance, Mrs. Adams only held an equity of redemption, it was not in her power to create any encumbrance or lien upon the estate that could take precedence of the mortgage, except with the consent of the mortgagee. Of such consent we have no evidence. It follows from this view of the case that the demandant, who claims under that mortgage, has the older and better title, and that the tenant's

Exceptions must be overruled.

VOSE v. BRONSON.

SUPREME COURT UNITED STATES, 1867.

[6 Wall. 452.]

APPEAL from the Circuit Court for Wisconsin.

In December, 1856, the La Crosse and Milwaukee Railroad Company, to secure ten millions of dollars in bonds, to be issued by them, executed a mortgage to Bronson, Soutter, and Knapp, as trustees for the bondholders. This mortgage was amended in 1858, so as to limit the issue to four millions. Bonds to that amount were issued, and became a lien on the road. In consequence of the failure of the company to provide for the payment of interest, the trustees, in 1859, instituted proceedings in the Federal Court of Wisconsin, to foreclose the mortgage; which proceedings, in 1862, passed to a decree. The road in 1863 was sold. After the decree, but before the sale, one Vose (the appellant), who had not been made a party defendant to the suit of foreclosure, filed a bill against the trustees just named, asking to come in and share in the proceeds of the sale of the mortgaged property in their hands.

The bill set forth that before the execution of the mortgage, but in immediate contemplation of it, the La Crosse Company had agreed to buy a large quantity of railroad iron of a firm to whose rights the complainant had succeeded, giving to them bonds to the extent of about \$714,000 in payment, at the rate of eighty cents on the dollar; that it was well understood between the parties that the firm, which was one dealing extensively in railroad iron, took the bonds, not to hold as investments, but for commercial and immediate use; that to guard against loss to the firm by a depreciation in the markets of the bonds thus to be assigned to it, by the company's selling any of those which they yet retained at a less rate than the 80 per cent, it was

agreed that if the company should sell any of their bonds to any one during a certain term named, at a less rate than this one, then, that the company should deliver to the firm so many additional bonds as would pay the firm for the iron in full, estimating the bonds already given and those to be given at the lowest rate at which any bonds had been sold. The bill further set forth that the iron (10,474 tons) was delivered to the company, and by them used in making their road, and now formed a material ingredient in the value of the property sold.

Admitting that the company had issued, sold, and delivered the whole four million dollars of bonds (so that on the face of the bill it appeared that the company had the control of no more bonds), the bill set forth that it had sold a large amount of them as low as forty cents on the dollar; that the firm, needing to "realize" on the bonds assigned to them, had been compelled to sell at that same rate, and that the effect of the company's thus selling 40 per cent was, that the firm had been paid but half the stipulated price for their iron. It set forth, moreover, that in fixing the claims which the respective bondholders had upon the proceeds of the sale of the mortgaged premises, a portion of the bonds were, by the final decree of foreclosure, cut down from the value apparent on their face to 40 per cent, on account of their having been sold at a discount; and that

The decree of foreclosure having been entered for . \$2,794,600 There remained as balance an unappropriated lien of . 1,205,400

Part of the original mortgage for \$4,000,000

The bill accordingly prayed that as the firm was to be paid only in bonds, and did not receive enough to pay them, that the requisite amount of bonds, that is to say another \$714,000, might be executed and delivered to them, or at any rate that they might stand in the same position as if such requisite number had been executed and delivered to them; and that the decree might be opened and the complainant let in so as that his equities might be provided for out of the unappropriated lien in the mortgage, which it was stated was sufficient to provide for them.

The bill, on demurrer to it, was dismissed by the Circuit Court.

Appeal here.

Mr. Justice Davis delivered the opinion of the court.

The question presented by this record is of easy solution. If Vose had brought suit against the La Crosse and Milwaukee Railroad Company for breach of their contract, the interpretation of it would have been a proper subject of inquiry, but the decision of this case does not depend on the disposition of that question. The appellant places his claim for relief on his right to have an outstanding equity with the La Crosse Company adjusted in the foreclosure suit, and his

demand attached to the foot of the mortgage. To do this, there must be a power somewhere to enlarge the mortgage, and where is it lodged? Certainly not with the trustees, for their duty is to see that the security held by them for their cestui que trusts is enforced according to the terms of the deed. They could neither enlarge the mortgage, nor consent to its enlargement. The court could not do it, nor the La Crosse Company, as it had covenanted with the trustees in behalf of the bondholders, that it would only issue four millions of dollars in bonds. The rights of the bondholders were fixed by the terms of the mortgage. The value of the bonds, as an investment, depended in a great measure on the number to be issued, and doubtless each purchaser, before he bought, had information of the character of the security on which he relied. The property might be very well a safe security for four millions of dollars, and very unsafe for any additional amount.

The doctrine contended for would utterly destroy the marketable value of all corporate securities. No prudent man would ever buy a bond in the market, if the provisions made for its ultimate redemption could be altered without his consent.

But it is said, as the court rendered a decree for less than the face of the bonds, equity will step in and allow the appellant to apply the vacuum of principal secured by the mortgage, to liquidate his claim. The answer to this is, that it does not concern the appellant whether the court rightfully or otherwise reduced a portion of the bonds. The bondholders, whose bonds were thus reduced, are the only parties in interest who could have any just cause of complaint against the action of the court, and if they did not feel aggrieved no other person has any right to complain. The security of the mortgage extended to four millions of bonds only, and whatever amount the court should ascertain was due on those four millions was the amount secured, and no more.

If Vose had been made a party defendant to the foreclosure suit, the decree would have been the same. But he was not a necessary party to that suit. The trustees, as the representatives of all the bondholders, acted for him, as well as the others. It would be impracticable to make the bondholders parties in a suit to foreclose a railroad mortgage, and there is no rule in equity which requires it to be done.

Decree affirmed.

DUNCAN AND ELLIOTT, TRUSTEES, v. MOBILE & OHIO RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, 1876.

[2 Woods, 542.]

PETITION filed in a suit in equity.

The petition stated that the interest-bearing bonded debt of the company was \$11,500,000, on which the annual interest was \$900,000, which, under existing circumstances, the road was unable to pay: that in 1874 the company made default in the payment of its interest, and that during a part of the year 1873, and in 1874 and 1875, in order to maintain its credit, had contracted a floating debt to the amount of \$582,385.52, which was expended in payment of interest, and for supplies, materials, and equipments. A portion of this debt, it was alleged, was secured by a pledge of bonds and other securities of the company, the par value of which exceeded the debt. but which would not sell for more than a third or fourth of the debt; another portion was secured by the individual indorsement of persons who had been president and directors of the company, and who gave their names and credit to maintain the credit of the company, and to purchase supplies; another part of the debt was held by the patrons and customers of the company, secured by third mortgage bonds, having little market value. The petition further stated that it was the hope and expectation of the trustees that there should be a reorganization of the company by the owners of the bonds becoming the owners of the railroad, and that for that purpose a removal of these floating claims might be desirable to the bondholders, if the same could be done on favorable conditions and with their consent.

The petitioners alleged that in their opinion, the debt could be compounded and settled at much less than its face, and that by its settlement a number of the bonds and securities of the company would be preserved from sacrifice, but that the petitioners had no authority to employ for that purpose the moneys which have come into their possession as trustees.

Petitioners did not admit that the holders of the floating debt had any legal claim upon the moneys in their hands arising from the income and receipts of the road since it has been in their hands; but they prayed for a reference to a master to report whether it was legal or proper to pay said floating debts, or any portion of them, as a compromise; that the trustees and representatives of the several classes of bondholders might be notified of the reference, and their action thereon reported to the court, and how far they consented to and approved said application, and that the master report what is prudent, legal, or proper to be done in the premises.

Woods, Circuit Judge. Briefly stated, the grounds upon which this recommendation is based by the master, and upon which the confirmation of his report was urged by counsel, are: (1), That the whole of the money represented by this floating debt has in good faith gone to the bondholders, partly and chiefly by paying their interest coupons; and as to the residue, by the improvements and betterments of the railroad property; and (2), that a large amount of the bonds of the company are hypothecated for the payment of this floating debt; and (3), that the settlement of this floating debt, by payment or compromise, is essential to such management of the property or reorganization of the company, as will preserve the valuable franchises, privileges, and exemptions of the existing corporation.

I have been unable to come to the conclusion, that the recommendations of this report ought to be adopted by the court.

The debt, which it is proposed to pay out of the income of the road, is a floating debt, partly secured by bonds, etc., inferior in rank to the great mass of bonds making up the bonded debt of the defendant company. The company has failed to pay the interest on those bonds having the superior lien, and for that reason the trustees of the first mortgage have taken possession of the road for the purpose, among others, of applying its income to the payment of the interest, and if there should be a surplus, to the principal of these bonds. The proposition is to apply, for the reasons stated, the income which the first mortgage bondholders are entitled to, to the payment of the floating debt.

The fact that the floating debt was contracted in good faith for the benefit of the railroad company's property, and therefore for the benefit of the bondholders, is true of perhaps all such debts. But that does not give the floating debt creditors any ground upon which to claim that their debt should be paid first. Galveston Railroad Co. v. Cowdrey, 11 Wall. 482.

But I do not understand that the floating debt creditors claim this application of the income of the road as a legal right.

It stands simply on the ground that to refuse their payment would be inequitable. But I cannot invade the legal rights of others to relieve the floating debt creditors from the position in which they have voluntarily placed themselves.

The facts that a large amount of inferior securities of the railroad company, now hypothecated for the floating debt, would be released by its payment, and that a reorganization of the company would be greatly facilitated and the valuable franchises of the company thereby preserved by the proposed payment of the floating debt, are doubtless strong considerations, when addressed to the bondholders themselves. But can this court waive the rights of the bondholders, because we might think it would turn out to their advantage? Can we make a contract for them, because we think it would be a good contract? Have we the power to take money which belongs to them and give it to others without their consent, because we think it would be for their

interest? They have not consented to this diversion of their money, and no one who is authorized to do so has consented for them. For the trustees to undertake to give assent for the bondholders is clearly outside of their powers and duties, which are plainly prescribed in the deed of trust.

This court is, in my judgment, without any power to make the decree recommended by the report. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a court of equity, would shake the credit of railroad securities throughout the world. I must, therefore, decline to adopt the recommendations of the master.

SECTION II. - POSSESSION.

A. Right to Possession.

ROCKWELL v. BRADLEY.

SUPREME COURT, CONNECTICUT, 1816.

[2 Conn. 1.]

SWIFT, C. J. The question is, whether an action of disseisin can be maintained, by the mortgagee, against the mortgagor, who continued in possession, without notice to quit.

The mortgagee, on the execution of the deed, is vested with the fee of the land, and is entitled to the immediate possession, though the law day has not elapsed. It is, however, the understanding of the parties that the mortgagor shall retain the possession.

The principle contended for, on the part of the defendant, is that the mortgagor continues in possession, by the license, consent, and agreement of the mortgage; that the possession is lawful; and that he cannot become a disseisor, unless a surrender of possession be demanded, or a notice to quit be given. Of course, to maintain this action, we must treat as a disseisor a man who has lawful possession; which is repugnant to acknowledged principles.

To decide this question, we must consider the nature of the right of a mortgagor in possession. He has been likened to a tenant at will; but the resemblance is very remote; for, it is agreed, he would not be entitled to emblements, or accountable for rent. The truth is, such an estate is of a peculiar nature, precisely resembling no other. Lord Mansfield says, in Keech v. Hall, Dougl. 22, he is a tenant at will in the strictest sense. Though the inference from the fact that the mortgagor is left in possession is an agreement that he shall continue it, yet this is under this condition, that he is so entirely subject to the will of the mortgagee, that he (the mortgagee) may consider his possession to be lawful, or treat him as a disseisor, without notice to quit. This results from the nature of an estate in mortgage, where the object is to give the mortgagee an absolute power over the pledge to enable him to secure or enforce the payment of the debt.

I would advise a new trial.1

¹ Accord: Roby v. Maisey, 8 B. & C. 767; Smartle v. Williams, 1 Salk. 245; Dunn v. Miller, 3 N. Sc. 347; Woodward v. Parsons, 59 Ala. 625; Stewart v. Scott, 54 Ark. 187; Blaney v. Bearce, 2 Me. 132; Lackey v. Holbrook, 11 Metc. 458; Brown v. Cram, 1 N. H. 169; Tyron v. Munson, 77 Pa. St. 250. — Ed.

CHICK v. WILLETTS.

SUPREME COURT, KANSAS, 1864.

[2 Kan. 384.]

By the Court, Crozier, C. J. Two questions are presented by the record: First, Which law, the twentieth section of the code, or the second section of the "amendatory act," prescribes the limitation; and second, When an action upon a promissory note, secured by a mortgage on real estate, is barred by the statute of limitations, has the mortgagee any remedy upon the mortgage? These are the facts: On the sixth day of April, 1858, at Kansas City, in the State of Missouri, the defendant executed to the plaintiffs his promissory note, payable one day after date. Afterwards, and on the 12th day of August of that year, the defendant, to secure the payment of the note, executed, in this State, a mortgage upon some lots in Topeka, which mortgage contained a stipulation that if default was made in the payment of the note for two years from the date of the mortgage, that instrument might be foreclosed, &c. On August 13, 1863, a suit was instituted upon the note and mortgage, and the facts, as above stated, being admitted, judgment was rendered for the defendant. To reverse that judgment, this proceeding is instituted.

The note having been made in Missouri, would, under the act of February 10, 1859, have been barred in two years from the passage of that act, if there were nothing else to be considered. By a stipulation in the mortgage, the time of payment was deferred two years from August 12, 1858.

The mortgage having been made in this State, was the arrangement, with reference to our statute of limitations, a Kansas or Missouri contract? Although no change was made upon the face of the note, yet the clause of the mortgage referred to was effective to change its terms as if written across its face. The time of its payment, with reference to the land, was extended two years. Its payment, as against the land, could not be enforced before that time; nor would the limitation laws begin to run against it until the expiration of that time. These changes in the original contract were effected by the paper which was executed in this State. The contract evidenced by the mortgage is essentially different from that set out in the note, and must control it. Therefore, the contract, as it stood, after the making of the mortgage, was a Kansas contract, and would not be barred in two years.

The statutes of limitation of this State are wholly unlike the English statute, and differ materially from the limitation laws of those States which have adhered to the common law forms of action and modes of procedure. Those statutes apply, in terms, to the form of the action at law, and contain no provisions concerning an equitable proceeding. If a party had concurrent remedies, one at law, the other in equity, courts

of equity applied the limitation prescribed for the action at law. But in all other cases they were said to act merely in analogy to the statutes, and not in obedience to them.

In this State, the case is entirely different. The distinction between actions at law and suits in equity is abolished; and the statutes of limitation apply equally to both classes of cases. They were made to apply to the subject-matter, and not to the form of action. In England and the States referred to, a limitation different from that prescribed for simple contracts in writing, was prescribed for specialties. Here, "an action upon a specialty, or any agreement, contract, or promise in writing," must be brought within three years; and it matters not what the relief demanded may be, whether such as could formerly be obtained only in a court of law, or such as might have been afforded by a court of equity exclusively.

Mortgages here differ essentially from mortgages at common law, and in the States referred to. At common law, a mortgage was a conveyance with a defeasance, and gave the mortgagee a present right of possession. Upon it, even before the conditions were broken, he might enter peaceably or bring ejectment. If the condition was broken, the conveyance became absolute. If the money was paid when due, the estate revested to the mortgagor; if not so paid, the estate was gone from him forever. After a time, the law of mortgage was so modified that the legal title was not considered as having passed until the condition was broken. At a later day, another still more important innovation was made. While it was considered that, upon condition broken, the mortgagee became invested with the legal title, and was entitled to possession, yet, in that condition of things, his title was subject to a defeasance. The rents and profits operated as cancellation, pro tanto, of his conveyance; and when they reached a sum sufficient to reimburse his original investment, with such use as the law allowed. the legal title reverted to the mortgagor, and he would be entitled to the possession; and he had a right to facilitate this operation by payment of the money, and upon application to a court of equity, his title would be disencumbered of the cloud the mortgage cast upon it. This right of the mortgagor was called "the equity of redemption," and, considering the then prevalent theory of mortgages, the phrase was peculiarly appropriate and expressive. The title had passed, but he had a right to redeem; and it is among the highest glories of equitable jurisprudence, that at so early a day the means of enforcing this right were supplied. Some of the States still adhere to the common law view. more or less modified by the real nature of the transaction; but in most of them, practically, all that remains of the old theories is their nomen-In this State, a clear sweep has been made by statute. common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases - without meaning except in reference to those theories — with which our reflections are still embarrassed, the

legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things. The statute gives the mortgagor the right to the possession, even after the money is due, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises; thus negativing any idea of title in the mortgagee. It is a mere security, although in the form of a conditional conveyance; creating a lien upon the property, but vesting no estate whatever, either before or after condition is broken. It gives no right of possession, and does not limit the mortgagor's right to control it—except that the security shall not be impaired. He may sell it, and the title will pass by his conveyance—subject, of course, to the lien of the mortgagee.

If we are right in these views as to our statute of limitations, and the operation of a mortgage under our law, the English cases and cases in New York and Ohio, cited by counsel for plaintiffs, have no application to the case at bar. The statutes of limitation under which they were made, make distinctions between notes and mortgages which do not exist here; and the operations of notes and mortgages there and here are totally different. The decisions are not authorities in this case, for the reason that they are not applicable, and cannot be made so. If our limitation law omitted mortgages, and our law of conveyances gave the right of possession to the mortgagee, some of them would be in point; but as neither of these conditions exist here, they throw no light upon the questions under consideration in the case at bar.

Our conclusions are, that the twentieth section of the code prescribes the limitation to an action on the note or mortgage, and as the three years expired on the 12th day of August, 1863, a suit commenced on the 13th was too late.

Judgment affirmed.¹

All the justices concurring.

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KEECH v. HALL

KING'S BENCH, 1778.

[1 Doug. 21.]

EJECTMENT tried at Guildhall, before Buller, J., and verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of non-suit, and cause shown, the court took time to consider; and, now, Lord Mansfield stated the case, and gave the opinion of the court, as follows.

¹ Accord: Kidd v. Temple, 22 Cal. 255; Brown v. Snell, 6 Fla. 741; Davis v. Anderson, 1 Ga. 176; Harrington v. Foley, 108 Ia. 268; Caruthers v. Humphrey, 72 Mich. 270; Trimm v. Marsh, 54 N. Y. 599; Bartlett v. Timberlake, 57 Mo. 499; Wood v. Trask, 7 Wis. 566.—En.

LORD MANSFIELD. This is an electment brought for a warehouse in the city, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rackrent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the derendant to redeem. There was no notice to quit; so that though the written lease should be bad, if the lessee is to be considered as tenant from year to year the plaintiff must fail in this action. The question, therefore, for the court to decide, is, whether, by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent; or whether he may not treat the defendant as a trespasser, disselsor, and wrongdoer. No case has been cited, where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (Belchier v. Collins); but, there, the mortgagee was privy to the lease, and, afterwards, by a knavish trick, wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity, goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a court of equity must follow not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee. to prevent him from considering the lessee as a wrongdoer. rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turns upon the agreement between the mortgagor and the mortgagee: when the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to guit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgager. The possession of the mortgagor cannot be considered as

holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction, that the mortgagor shall continue in possession. Whoever wants to be secure. when he takes a lease, should inquire after and examine the title deeds. In practice indeed (especially in the case of great estates) that is not often done, because the tenant relies on the honor of his landlord: but whenever one of two innocent persons must be a loser. the rule is, qui prior est tempore, potior est jure. If one must suffer, it is he who has not used due diligence in looking into the title. was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the mesne profits from the tenant. in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have shown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear. clearly of opinion that the plaintiff is entitled to judgment.

The rule discharged.



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KIMBALL v. LOCKWOOD.

SUPREME COURT, RHODE ISLAND, 1889.

[6 R. I. 138.]

DEBT for rent of a shop in High Street, Providence, wherein the plaintiff claimed \$150, for the last three quarters of the year elapsing between March 1, 1858, and March 1, 1859, under a lease parol by him made to the defendants.

The case was submitted to the court, under the general issue, in fact and law; and it appeared, that the late Henry Matthewson, being the owner of the leased premises, in his lifetime, mortgaged them in fee to his son, Henry C. Matthewson, and, upon his death, they, with other real estate, came into the possession of the plaintiff, whose wife was one of said Matthewson's heirs at law; that being thus in possession, the plaintiff leased the shop in question

to the defendants, by parol, from March 1, 1858, to March 1, 1859, at the rent of \$200 for the year, payable quarterly; that after the death of his father, the son's mortgage having become due, on the 13th day of May, 1858, he sued the plaintiff in ejectment to recover possession of the estate of which the shop in question was a tenement, and gave notice to the defendants to pay their rent to him as mortgagee; that the defendants, having offered, under the advice of counsel, to pay rent to the plaintiff if he would give them a bond of indemnity against the claim of the mortgagee, which he did not do, promised the mortgagee to pay the rent to him, and did pay to him the last three quarters rent, accruing from the first day of June, 1858, to the first day of March, 1859, under a bond of indemnity from the mortgagee against the claim of the plaintiff, to recover which rent, after such payment, this action was brought. The rent of the quarter, during which notice was given by the mortgagee to the defendants to pay the rent to him, was paid by them to the plaintiff.

AMES, C. J. It seems to be clear, upon principle, and is well settled by authority, that a mortgage by the lessor of lands under lease, operating as an assignment, pro tanto, of the reversion, carries the rent as incident to it, to the mortgagee. In such case, therefore, all that the law requires of the mortgage to entitle him to rent of the tenant of the mortgagor, is notice to the tenant to pay the rent to him; such notice preventing any injustice to the tenant from double payment.

If, on the other hand, the lease be subsequent to the mortgage, as the mortgage gives to the mortgage no title to the reversion out of which the lease was granted, he cannot, by mere notice, compel the tenant to pay rent to him, nor does his title to the rent accrue until he has obtained possession of the mortgaged estate. He is not the landlord of the mortgagor, nor by virtue of the relation between them, entitled to the rents and profits of the mortgaged estate, as long as the mortgagor retains possession. Evans v. Elliot, 9 Ad. & Ell. 159; The Manchester Hospital and Life Ins. Co. v. Wilson, 10 Met. 126.

The mortgage, however, conveys the title to possession to the mortgagee, and, indeed, when, as in this case, forfeited, the whole title at law; and, unless some statute forbid, which none here does, the tenant of the mortgagor may attorn to the mortgagee, and by thus placing him in possession of the mortgaged premises, entitle him to the rents thereof. There is no disloyalty to his landlord in such attornment by the tenant; since, thereby, he only recognizes a title which his landlord has granted. Jones v. Clark, 20 Johns. 51. In Evans v. Elliot, supra, Lord Denman seems to agree that the tenant's attornment will create a privity between himself and the mortgagee, or, as he expresses it, "is at least necessary" to create the relation of tenant and landlord between them; although he decides that the attornment will not relate back to a notice before

given by the mortgagee to the tenant, but creates the privity and right to rent only from the time when it is actually made. As attornment is nothing more than the consent of the tenant to the grant of the seignory, or, in other words, to become tenant of the new lord (Co. Litt. 309a; Butler's note, 272), and the tenants in this case, by promising to pay, and actually paying the rent to the mortgagee, thus attorned to, and became tenants to him, it follows, that they rightfully paid to him the subsequently accruing rent, and cannot be compelled to pay it over again to the plaintiff. Judgment must therefore be rendered for the defendants, for their costs.

MOSS v. GALLIMORE.

KING'S BENCH, 1779.

[1 Doug. 279.]

In an action of trespass, which was tried before NARES, J., at the last Assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved. The case stated as follows: One Harrison, being seised in fee, on the 1st of January, 1772, demised certain premises to the plaintiff for twenty years, at the rent of £40 payable yearly on the 12th of May; and, in May, 1772, he mortgaged the same premises, in fee, to the defendant, Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but £28, which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of January, 1779, one Harwar went to the plaintiff on behalf of Gallimore, showed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. plaintiff told Harwar that the assignees of Harrison had demanded it before, viz., on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said, he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered, and distrained for the rent, and, thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seised and distrained. &c., by virtue of an authority, &c., for the sum of £28 being rent, and arrears of rent, due to the said Ester Gallimore, at Michaelmas last past, for, &c., and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of £22 2s. The question stated for the opinion of the court was, Whether, under all the circumstances, the distress could be justified?

LORD MANSFIELD. I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor; for, the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. This, however, is entangled with difficulties. The question here is whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne, attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, relates to the time of the feoffment. the statute, the conveyance is complete without attornment, but there is a provision, that the tenant shall not be prejudiced for any act done by him, as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of executions it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only quodam modo. Nothing is more apt to confound than a simile. When the court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant, in the present case, cannot be damnified, for the mortgagor can never oblige him to pay over again the rent which has been levied by this

distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

KING v. HOUSATONIC RAILROAD CO.

SUPREME COURT, CONNECTICUT, 1877.

[45 Conn. 226.]

Hovey, J. The proceedings below were upon a scire facias, to recover certain rents due from the defendants as lessees of the New York, Housatonic & Northern Railroad Company. The lease reserving the rents was executed on the 26th day of February, 1872, and was for the term of five years from the 1st day of March then next, when the defendants entered into possession under the lease. Subsequently, on or about the first day of October, 1872, the lessors, being the owners of the leased premises, mortgaged the same, with other property situate in the State of New York, to secure the payment of certain bonds of the mortgagors, amounting to the sum of two million dollars, to David S. Dunscomb and Erastus F. Mead, as trustees for those who might become holders of the bonds. The principal of the bonds was made payable on the first day of October, 1892, and the interest semiannually on the first day of April and the first day of October in each year, upon the presentation and surrender of the interest warrants or coupons which were annexed to the bonds. And the mortgage expressly authorized the mortgagees, after six months' default in the payment of interest, to enter into and take possession of the property mortgaged and receive the rents, income, and profits thereof. Soon after the execution of the mortgage the bonds passed into the hands of bona fide holders for value, and still remain outstanding and unpaid. The mortgagors having made default in the payment of interest more than six months prior to the 15th day of March, 1875, and interest to a large amount being then due and unpaid, the mortgagees on that day gave notice thereof to the defendants and demanded of them the rents then due and thereafter to become due under their lease. afterwards the plaintiff commenced a suit by foreign attachment against the mortgagors, the New York, Housatonic and Northern Railroad Company, and attached the rents then due, amounting to the sum of \$2,215.60. In that suit the plaintiff recovered judgment, took out execution, placed the execution in the hands of a proper officer, and the officer, by virtue of the execution, on the 23d day of December, 1875, made demand of the present defendants of the sums contained in the execution and of any estate of the New York, Housatonic and Northern Railroad Company in their hands, but the defendants refused to comply with the demand. And on the 21st day of February, 1876, the suit upon which the proceedings below were had was brought. The court below rendered judgment in favor of the defendants; and the question is whether in so doing the court erred.

It is a well-settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion. Co. Litt. 151, 152; 2 Bl. Comm. 176; 4 Kent. 354. The consent of the tenant, expressed by what was called his attornment, was, however, necessary to the perfection of the grant in England, until the fourth year of the reign of Queen Anne; but in that year a statute was passed which made the grant effectual without attornment. And since that time notice of the grant to the tenant has been sufficient to entitle the grantee to demand and recover the rents. Birch v. Wright, 1 T. R. 384; Lumley v. Hodgson, 16 East, 99.

Where the grant is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he elects not to take them, as he generally does so long as his interest is paid, he may forbear to give notice to the tenant, and in that case the mortgagor is authorized to collect the rents and appropriate them to his own use. But if the mortgagee elects to take the rents and gives notice of his election to the tenant, he then becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor. The leading authority for this doctrine is the case of Moss v. Gallimore, Doug. 279. The decision in that case seems to have settled the law in England. 2 Cruise Dig. 84; Birch v. Wright, supra; Trent v. Hunt, 9 Exch. 14. And its soundness, in view of the relations of a mortgagor and mortgagee of a reversion to each other and to a tenant in possession under a lease prior to the mortgage, cannot well be questioned. In commenting upon the decision, the learned English editor of Smith's Leading Cases observes that it "is upon a point which seems so clear in principle that, were it not for its general importance, it would, perhaps, be matter of surprise that any case should have been deemed requisite to establish it." 1 Smith's Lead. Cas. 693. It is true, as suggested by counsel for the plaintiff, that the court, in making that decision, was governed by the provisions of the statute of Anne. But the principle embodied in that statute and enforced in the case of Moss v. Gallimore, has been adopted by the courts of last resort in many of our sister States (4 Kent, 165); and was expressly sanctioned and approved by this court in the case of Baldwin v. Walker, 21 Conn. 168. In that case one Stoddard, being the owner of an undivided half of certain real estate, leased it to the defendant for a term of years and afterwards

mortgaged it to the plaintiff. The defendant had notice of the mortgage, but refused to pay to the plaintiff the rent due under the lease; and the plaintiff sued in an action of covenant to recover it, and judgment was rendered in his favor. The case then came to this court upon a motion for a new trial, and also upon a motion in error. Both motions were unsuccessful, and the judgment below was affirmed. Church, J., in giving the opinion of the court, after referring to the lease and declaring that as between Stoddard the lessor and the defendant the lease must be treated as an effective one and as leaving when made a reversion in Stoddard, says: "By his mortgage to the plaintiff this reversion, as a subsisting legal interest, was conveyed or assigned to the plaintiff, unless he elected to treat it as void. has not done, but claims, as he may, his right as mortgagee or assignee to the rent incident to such reversion;" citing 2 Cruise Dig. 111; Moss v. Gallimore, Doug. 279, 2 Swift Dig. 179; Fitchburg Manuf'g Co. v. Melvin, 15 Mass. 268. The learned judge then observes that, "if the lease had been executed after the mortgage to the plaintiff, he could not as mortgagee, perhaps, have any remedy for the recovery of this rent, without attornment, for want of legal priority." That case is decisive of the one at bar and fully sustains the court below in the judgment which it rendered in favor of the defendants. The judgment must, therefore, be affirmed.

In this opinion the other judges concurred.

B. Receipt of Rents and Profits.

DE NICHOLLS v. SAUNDERS.

COMMON PLEAS, 1870.

[L. R. 5 C. P. 589.]

Action for wrongful entry and wrongful distress.

Willes, J. It is impossible in this case to give judgment otherwise than for the defendants. The question is, whether, where there has been an assignment of a reversion, payment of rent to the assignor before rent-day takes away the rights of the assignee to the rent so completely, that if he should give notice before rent-day of the assignment the payment would still be good. There would be an obvious injustice in that even if the payment were made before the assignment, because a person who bought the reversion on the faith that the rent was becoming due would be defeated by a transaction between the landlord and tenant of which he had no notice. But that would not be so strong a case as this, because a release by the landlord of all rent before assignment would be good against an assignment of

the reversion, and obtains a right to give notice to the tenant to pay the rent to him before payment is made to the assignor, and in which, therefore, the landlord had no power to accept payment or give a release at the time the payment was made. It is clear that the common law authorities which say that payment before notice is good against a mortgagee, and which are represented by Watts v. Ognell, Cro. Jac. 192, have no application to the present case; they apply only to a person fulfilling his obligation to one who, at the time it is fulfilled, is the apparent reversioner: which is similar to payment to a creditor who has assigned the debt without notice to the debtor. These cases depend upon a rule of general jurisprudence not confined to choses in action, though it seems to have been lost sight of in some recent cases — viz. that if a person enters into a contract, and, without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation; that is a rule which is declared rather than enacted by 4 Anne, c. 16, s. 10. That statute did away with the necessity for attornment, but protected the tenant in cases where he had paid the rent due from him before notice of the assignment; this provision of the statute, however, clearly applies to the fulfilment of an obligation to pay rent imposed by the lease. There has been no such payment here, for payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent. receipt of the rent could not be treated here as a discharge by the landlord, because by assigning the reversion before the rent was received by him he had parted with the power of giving such a discharge. The plaintiff lent his money on a contract, which was under an implied condition that the landlord should continue entitled to the rent at the time it became due, and able, therefore, then to give the plaintiff a valid discharge.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for the defendants.1

¹ Compare: Castleman v. Belt, 2 B. Mon. 157, accord; Stone v. Patterson, 19 Pick. 476, contra. — Ed.

FINCK v. TRANTER.

KING'S BENCH DIVISION, 1905.

[1905, 1 K. B. 427.1]

APPEAL of the plaintiff from the judgment of the Common Serjeant in an action tried in the Mayor's Court.

The plaintiff was the occupier of certain premises in the City of London as tenant of one Vincent, the lessee. On February 19, 1903, Vincent deposited the lease of the premises with the defendant as security for an advance of £250 then made by the defendant to Vincent, and at the same time an agreement in writing was entered into by Vincent as mortgager and the defendant as mortgagee by which Vincent charged the premises with the payment of the £250 and interest.

On March 21, 1904, Vincent being then in default in the repayment of the principal and interest, the defendant's solicitors gave notice in writing to the plaintiff to pay all rent then due or thereafter to become due in respect of his tenancy of the premises to them on behalf of the defendant "as mortgagee" of the premises "under and by virtue of a charge dated February 19, 1903." The plaintiff paid to the defendant's solicitors £10, being one quarter's rent of the premises to March 25, 1904, and subsequently brought this action to recover the £10 as money received by the defendant for the use of the plaintiff.

The Common Serjeant held that the equitable mortgage gave the defendant authority to receive the rent as Vincent's agent as soon as Vincent made default, and that the notice of March 21, 1904, was a notice to pay the defendant as having such authority, and he accordingly directed the verdict to be entered for the defendant.

The plaintiff appealed.

LORD ALVERSTONE, C. J. The question raised by this case is, I think, new. I should have thought that one conclusive answer to the plaintiff's claim would be that the rent was not paid to the defendant under any mistake of fact, but with full knowledge on the part of the plaintiff that the defendant was demanding it in his capacity of equitable mortgagee, the plaintiff having had notice of the charge. I mention that because the Common Serjeant appears to have based his judgment upon the point that the equitable mortgage gave the defendant authority as agent for the mortgager to receive the rent as soon as default had been made under the mortgage. I am not prepared to overrule the

¹ Only one opinion is printed; the other justices concurred. - Ed.

Common Serjeant on that point, but I think the defendant's case can also be supported on another ground. I agree with the main contention of the plaintiff that an equitable mortgagee has no right to receive rent until he has obtained an order of the Court. The authority for that proposition is to be found in Ex parte Bignold, the case referred to in Fisher on Mortgages, where it was held that in general an equitable mortgagee is not entitled to the rents prior to the date of the order for sale; but the Court also held that where an equitable mortgagee gets possession lawfully, he is entitled to the rents from the date of posses-It follows, therefore, that even though the defendant was not entitled as of right to demand that the rent should be paid to him, yet as it was not paid by the plaintiff under any mistake of fact, but after notice that the defendant was claiming it as equitable mortgagee, the plaintiff cannot recover it back. It was contended that if an action had subsequently been brought against the plaintiff by his landlord, the mortgagor, to recover this same rent, he would have had no defence to the action, but a plea that the rent had been paid to the present defendant with the knowledge of the landlord would have been a good defence; and that is, I think, what the Common Serjeant has decided. This appeal must, therefore, be dismissed. Appeal dismissed.

NOYES, RECEIVER, v. RICH.



SUPREME JUDICIAL COURT, MAINE, 1861.

[52 Me. 115.]

Davis, J. In the suit in equity of Mason & als. v. Y. & C. Railroad Co. & als., ante, p. 80, the plaintiff was appointed a receiver, and was ordered to take certain property of the corporation into his possession. The defendant had possession at the time, as superintendent of the railroad; and he also had money in his hands amounting to about seven hundred dollars, which had accrued by operating the road. This he refused to deliver to the receiver; and this suit is brought to recover it.

In a suit in equity, in its nature in rem, when a receiver is appointed, the right to the custody of the property in controversy vests in him immediately upon the filing of his bond. Albany Bank v. Schermerhorn, 1 Clark's Ch. 297. And he may, by order of Court, bring a suit for it in his own name. Green v. Bostwick, 1 Sandf. Ch. 185.

But this right of custody extends only to the property which is the subject matter of the litigation. Under a general creditor's bill, to

recover the entire property of a debtor, the receiver is entitled to the whole of such property. Chipman v. Sabbaton, 7 Paige, 47. So assignees in bankruptcy, or insolvency, take the whole estate. So would receivers of banks, under our statute, have the right to the custody of the entire corporate property, of whatever kind.

The suit of Mason and others is not a general creditor's bill, though analogous to one. They bring it, not in behalf of all the creditors of the corporation, but in behalf of certain specified creditors. Nor does it seek to reach all the property of the corporation, but certain specified property, mortgaged in trust for their benefit, by a deed to Myers, dated Feb. 6, 1851. The right of the plaintiffs cannot extend beyond the property mortgaged; and the right of the receiver must necessarily have the same limitation.

There are certain defendants in the equity suit, trustees under a subsequent mortgage, who have other conveyances from the railroad company. Whether they can hold the money in the hands of the defendant, in any adjustment or controversy with him, it is immaterial now to inquire.

The mortgage, of which Mason and others claim the benefit, was afterwards assigned by Myers, by his deed to the trustees referred to, and to other parties who also deeded to said trustees. But the assignees did not take possession of the railroad, under the mortgage, for condition broken. Smith and Myers undertook to take possession; but it was after the mortgage had been assigned, and so no rights were affected by it.

It will hardly be contended that, while mortgagors remain in possession, they can be compelled to pay the rents and profits of the property to the mortgages. Boston Bank v. Reed, 8 Pick. 459; Mayo v. Fletcher, 14 Pick. 525. And yet, that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage, until it was done by the receiver, in March, 1860. The money in the defendant's hands accrued from the earnings of the road prior to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject matter of the suit in equity; and the receiver was not entitled to it.

Plaintiff nonsuit.

NEW YORK SECURITY AND TRUST CO., RESPONDENT, v. SARATOGA GAS AND ELECTRIC LIGHT CO. ET AL., DEFENDANTS.

COURT OF APPEALS, NEW YORK, 1899.

[159 N. Y. 137.]

O'Brien, J., said (in part): The questions raised by this appeal arise upon a controversy between the receiver in an action to foreclose a corporate mortgage, given to secure bondholders, and a receiver appointed at the same time, in a suit by a general creditor of the corporation, brought for the purpose of sequestrating the assets of the corporation after a judgment upon the claim and an execution returned unsatisfied. While both receivers were appointed at the same instant of time, the sequestration action was commenced before the foreclosure action and before the appointment of the receiver therein.

On the first day of February, 1887, the Saratoga Gas and Electric Light Company, a domestic corporation, executed and delivered to the American Loan and Trust Company a mortgage to secure its bonds, amounting in the aggregate to three hundred thousand dollars, due in 1907. The bonds so issued had interest coupons attached, payable semi-annually, at the rate of six per cent. The property covered by the mortgage is described therein as follows: "All the corporate property, real, personal, and mixed, including all lands, easements, rights of way, buildings, fixtures, materials, supplies, machinery and plant, franchises, contracts and choses in action, whether now owned or hereafter acquired or constructed by said gas company, together with the appurtenances thereto, and all rents, tolls, issues, income, and profits of said gas company, present and future, to have and to hold the same unto said American Loan and Trust Company, its successors and assigns forever, upon trust for the equal benefit and security of all holders of said bonds, and subject to the following covenants, conditions, and provisions which are assented to by both parties, to wit," etc. It must, I think, be admitted that this language is broad enough to cover not only all the property that the corporation then had, but all that it ever could have by any possibility, whether lands, chattels, moneys, or things in action. But the language here used, broad and comprehensive as it is, is very much qualified and restricted by other provisions of the instrument, as will be seen by reference to the following stipulations: I. "Until default occurs in some duty, or upon some covenant, agreement, or promise of the gas company hereunder, said gas company, its successors and assigns, shall retain the possession, control, and enjoyment of all the property and franchises hereby mortgaged, and may receive and use the earnings, income, and profits thereof in any manner not inconsistent with these presents, nor tending to lessen the security hereby provided." II. "The

said gas company, for itself and its successors, covenants to pay to the several holders of the bonds hereby secured, the principal and interest of said bonds, according to the tenor and true intent of said bonds and the coupons thereto attached." V. "But if default be made in any payment of principal or interest upon said bonds when due, or in the performance of any covenant or agreement on the part of the said gas company herein contained, and if such default shall continue for the period of sixty days, then, and in either of said cases. the trustee may enter into and upon and take possession, management. and control of all the property and franchises covered by these presents, and may operate the same, and continue the business, and exercise the franchises of said gas company, making all needful repairs, alterations, and additions, and may collect and receive all earnings and income thereof." VII. "If any default shall occur or continue as in article five specified (that is, 'continue for the period of sixty days'), the trustee may, and upon the written request of the holder or holders of one-fourth or more of said bonds then outstanding, accompanied by indemnity as hereinafter provided, shall, with or without entry as aforesaid, proceed to foreclose this mortgage either by advertisement or sale according to law, or by proper judicial proceedings."

These several provisions of the instrument must obviously be read together in order to ascertain the real intention of the parties and the true construction which should be placed upon the agreement. Notwithstanding the broad general language used in the description of the property mortgaged, it is plain that the mortgagor was to have, at least until default, the possession and enjoyment of all the property, whether existing at the time or acquired in the future, and was to use the future earnings for the purpose of conducting the business for which the corporation was organized. This must mean that it had a right to sell and transfer the future products of its operations as its own, free and clear from any lien of the mortgagee. The intention was that it should purchase materials for its business, employ labor, contract debts, and discharge all obligation arising therefrom by the use of the products of the business or the earnings of the plant.

In this condition of things the corporation made default in the payment of the interest coupons due on the first of August, 1893, and on November 11th following the plaintiff, as substituted trustee, brought an action to foreclose the mortgage, and a receiver was appointed on the 16th of November, following, and on the same day, and at the same time, the sequestration creditor procured the appointment of a receiver in his action. The receiver in the foreclosure action took possession of the gas plant and proceeded to operate the works and to make and sell manufactured gas and electricity. At that time there were moneys in the office of the company and to its credit on deposit in banks, and due to it on open accounts for gas and electricity manufactured before, and it owed various debts for

materials which it had purchased in conducting its business. There came to the hands of the receiver in the foreclosure action from the moneys on hand prior to the commencement of the action, and from the earnings of the corporation prior to that date and after the execution of the mortgage, in the form of open accounts or notes, the sum of over four thousand dollars, which the receiver in the sequestration action, representing general creditors, claims should be paid to him for distribution among such creditors. In other words, the question is, whether the earnings of the corporation from its business, in the sale of its products, prior to the time of the commencement of the action to foreclose the mortgage and the date of the possession by the receiver in that action, belong in equity to the bondholders or to the general creditors? The Special Term held that the general creditors of the corporation had the prior equitable right to the fund, but the orders of that court were reversed by the Appellate Division, which held that the fund in equity belonged to the receiver appointed in the foreclosure action for the benefit of the mortgage bondholders. An appeal to this court was allowed, and the following question certified for its opinion:

"Under and by virtue of the operation of the mortgage given by the Saratoga Gas and Electric Light Company, has the mortgagee, or the receiver appointed in the foreclosure action, an equitable lien, prior to the right of the receiver in the sequestration action, upon the debts and accounts due to the corporation upon sales by it of products of its plant, produced after the giving of the mortgage and before the appointment of either receiver?"

The right of the mortgagor to deal with these products and earnings as its own under the stipulations of the mortgage has already been noticed. That right, it seems to me, is entirely inconsistent with the existence of any lien upon future products or earnings by the mortgagee. The latter could not have a lien upon such earnings or products while the mortgagor was permitted to use them for the conduct of its business and the payment of its current debts. We think that the true construction of the instrument is this: Where a mortgage by a corporation to secure the payment of the principal and interest of its bonds, such as this is, is made, although in terms purporting to include future earnings and products, it does not, as against general creditors, operate as a lien upon such earnings until actual entry and possession under the mortgage by the mortgagee. This results from the stipulation in the instrument that until default the mortgagor shall have the use of the earnings in the conduct of its business, and that upon default the mortgagee may go into possession, exercise the corporate franchises, and appropriate the earnings to the payment of the debt secured by the mortgage. The right of the mortgagor, in the meantime, to the use of the earnings, amounts, practically, to absolute ownership, and hence the mortgage cannot operate as a lien upon such earnings to the prejudice of the general creditors until

actual entry and possession taken, and then only upon what is earned after that time. The lien of the mortgage upon future earnings is consummated as against other creditors only by the fact of the possession of the property, and cannot have any retroactive operation, since it would then deprive the unsecured creditor of the fund, upon the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as his own. The lien upon the earnings, in favor of the bondholders, attaches only upon what is earned after the time when the lien is perfected by entry and possession. This is the construction which has been given to corporate mortgages, expressed in substantially the same terms, by the Supreme Court of the United States, by the English courts, and by the highest courts of many of our sister States. The authorities on this question are quite numerous, and when examined will be found to sustain the proposition that I have stated.

We think that justice and equity are best promoted by limiting the right or lien of the bondholders to such earnings only as shall accrue after the mortgage trustee or the receiver shall have actually taken possession. The earnings prior to that time should in equity be awarded to the general creditor.

For these reasons we think that the orders appealed from should be reversed and those of the Special Term affirmed, with costs, and that the question certified should be answered in the negative.

All concur.

Ordered accordingly.

CLARKE v. CURTIS.

COURT OF APPEALS, VIRGINIA, 1844.

[1 Gratt. 289.]

The original cause, having been proceeded in according to the directions of this court, came on together with the supplemental suit, to be heard on the 18th of April, 1842, when the defendant Clarke moved the court to dissolve the injunction granted to restrain him from collecting the rents due, which motion the court overruled; and then made a decree in the original cause, directing the defendant Clarke to pay to the plaintiff below the sum of 10,561 dollars 59 cents, with interest on 10,170 dollars 2 cents from the first day of June 1839, till paid; and in default of payment, that the tract of land, called Perton, be sold. From the decree in both cases, Clarke obtained an appeal to this court.

ALLEN, J., delivered the opinion of the court.

The court is of opinion, that although it is competent for a court of equity, in a proper case, to sequestrate the rents and profits of mortgaged or encumbered property, where a forfeiture has accrued, and such rents and profits may be necessary to discharge the encumbrances, it is not competent to recover from the mortgagor, or equitable owner in possession, the rents and profits actually received by him, or which accrued before any order of sequestration was made. The court is, therefore, of opinion, that it was improper to injoin the appellant from collecting the rents which had previously accrued, or were about to fall due, for the previous occupation of the encumbered premises; and that there was error in overruling the motion to dissolve the injunction.

TEAL v. WALKER.

VIOLENCE COURT, UNITED STATES, 1883.

[111 U. S. 242.]

Action for breach of an agreement in a mortgage made to Hewett to secure a note given by Teal to Walker. Demurrer overruled.

On July 6, 1877, the interest on the note being in arrear since January 21st preceding, Hewett demanded of Teal the possession of all the property conveyed by said deeds. He refused to yield possession, and held the lots in the city of Portland until November 30, 1878, and the farm lands until some time in the same month and year.

Walker, by reason of Hewett's refusal to surrender possession of the property conveyed in trust to Hewett, was compelled to and did bring suit to enforce the sale of the property. All the property was sold, either in accordance with the terms of the defeasances above mentioned or by order of court, and the proceeds of the sale fell far short of paying the note, leaving a balance due thereon of more than \$50,000, which Goldsmith had no means to pay.

This action was brought by Walker, the payee of the note, against Teal, to recover the damages which he claimed he had sustained by the refusal of Teal to surrender possession of the property of which Goldsmith had been the owner, or which he had owned jointly with Teal, and which had been conveyed to Hewett in trust as aforesaid. The complaint recited the facts above stated, and averred that by reason of the refusal of Teal to surrender possession of the property to Hewett, Walker had been damaged in the sum of \$16,000, for which sum the complainants demanded judgment.

Mr. Justice Woods delivered the opinion of the court. He stated the facts in substance as above, and continued:—

We believe that the rule is without exception that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession. In the case of Moss v. Gallimore, 1 Doug. 279, Lord Mansfield held that a mortgagee, after giving notice of his mortgage to a tenant in possession holding under a lease older than the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues afterwards. This ruling has been justified on the ground that the mortgagor, having conveyed his estate to the mortgagee, the tenants of the former became the tenants of the latter, which enabled him, by giving notice to them of his mortgage, to place himself to every intent in the same situation towards them as the mortgagor previously occupied. Rawson v. Eicke, 7 Ad. & El. 451; Burrowes v. Gradin, 1 Dowl. & Lowndes, 213.

Where, however, the lease is subsequent to the mortgage, the rule is well settled in this country, that, as no reversion vests in the mortgage, and no privity of estate or contract is created between him and the lessee, he cannot proceed, either by distress or action, for the recovery of the rent. Mayo v. Shattuck, 14 Pick. 533; Watts v. Coffin, 11 Johns. 495; McKircher v. Hawley, 16 Johns. 289; Sanderson v. Price, 1 Zabr. 637; Price v. Smith, 1 Green's Ch. (N. J.) 516.

The case of Moss v. Gallimore has never been held to apply to a mortgagor or the vendee of his equity of redemption. Lord Mansfield himself, in the case of Chinnery v. Blackman, 3 Doug. 391, held that until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profits made.

The rule on this subject is thus stated in Bacon's Abridgment, Title Mortgage C: "Although the mortgagee may assume possession by ejectment at his pleasure, and according to the case of Moss v. Gallimore, Doug. 279, may give notice to the tenants to pay him the rent due at the time of the notice, yet, if he suffers the mortgagor to remain in possession or in receipt of the rents, it is a privilege belonging to his estate that he cannot be called upon to account for the rents and profits to the mortgagee, even although the security be insufficient."

So in Higgins v. York Buildings Company, 2 Atk. 107, it was said by Lord Hardwicke: "In case of a mortgagee, where a mortgager is left in possession, upon a bill brought by the mortgagee, for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor," and the same judge said in the case of Mead v. Lord Orrery, 3 Atk. 244: "As to the mortgagor, I do not know of any instance where he keeps in possession that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into possession."

In Wilson, ex parte, 2 Ves. & B. 252, Lord Eldon said: "Admitting the decision in Moss v. Gallimore to be sound law, I have been often surprised by the statement that a mortgagor was receiving the rents for the mortgagee. . . . In the instance of a bill filed to put a term out of the way, which may be represented as in the nature of an equitable ejectment, the court will, in some cases, give an account of the past rents. There is not an instance that a mortgagee has per directum called upon the mortgagor to account for the rents. The consequence is, that the mortgagor does not receive the rents for the mortgagee." See also, Coleman v. Duke of St. Albans, 3 Ves. Jr. 25; Gresley v. Adderly, 1 Swanst. 573.

The American cases sustain the rule that so long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents, he must take means to obtain the possession. Wilder v. Houghton, 1 Pick. 87; Boston Bank v. Reed, 8 Pick. 459; Noyes v. Rich, 52 Me. 115.

In Hughes v. Edwards, 9 Wheat. 500, it was held that a mortgagor was not accountable to the mortgagee for the rents and profits received by him during his possession, even after default, and even though the land, when sold, should be insufficient to pay the debt, and that the purchaser of the equity redemption was not accountable for any part of the debt beyond the amount for which the land was sold.

In the case of Gilman v. Illinois & Mississippi Telegraph Company, 91 U.S. 603, it was declared by this court that where a railroad company executed a mortgage to trustees on its property and franchises, "together with tolls, rents, and profits to be had, gained, or levied thereupon," to secure the payment of bonds issued by it, the trustees, in behalf of the creditors, were not entitled to the tolls and profits of the road, even after condition broken, and the filing of a bill to foreclose the mortgage, they not having taken possession or had a receiver appointed. The court said, in delivering judgment in this case: "A mortgagor of real estate is not liable for rent while in possession. contracts to pay interest, not rent." So in Kountze v. Omaha Hotel Company, 107 U. S. 378, it was said by the court, speaking of the rights of a mortgagee: "But in the case of a mortgage, the land is in the nature of a pledge: it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or third person claims under him. . . . The plaintiff in this case was not entitled to the possession, nor the rents and profits." See also Hutchins v. King, 1 Wall. 53, 57-58.

Chanceller Kent states the modern doctrine in the following language: "The mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him, takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover the possession by regular entry by suit before he can treat the mortgagor, or the person holding under him, as a trespasser. 4 Kent Com. 157. See also American Bridge Company v. Heidelbach, 94 U. S. 798; Clarke v. Curtis, 1 Grattan, 289; Bank of Ogdensburg v. Arnold, 5 Paige Ch. 38; Hunter v. Hays, 7 Biss. 362; Souter v. La Crosse Railway, Woolworth C. C. 80, 85; Foster v. Rhodes, 10 Bank. Reg. 523. The authorities cited show that, as the defendant in error took no effectual steps to gain possession of the mortgaged premises, he is not entitled to the rents and profits while they were occupied by the owner of the equity of redemption.

The case against the right of the defendant in error to recover in this case the rents and profits received by the owner of the equity of redemption is strengthened by section 328, chapter 4, title 1, General Laws of Oregon, 1843–1872, which declares that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

This provision of the statute cuts up by the roots the doctrine of Moss v. Gallimore, ubi supra, and gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. For if a mortgage is not a conveyance, and the mortgagee is not entitled to possession, his claim to the rents is without support. This is recognized by the Supreme Court of Oregon as the effect of a mortgage in that State. In Besser v. Hawthorn, 3 Oregon, 129, at 133, it was declared: "Our system has so changed this class of contracts that the mortgagor retains the right of possession and the legal title." See, also, Anderson v. Baxter, 4 Ore. 105; Roberts v. Sutherlin, id. 219.

The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewett, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the State, it cannot be enforced. Railroad Company v. Lockwood, 17 Wall. 357; Bank of Kentucky v. Adams Express Company, 93 U. S. 174; Marshall v. Baltimore & Ohio Railroad Company, 16 How. 314; Meguire v. Corwine, 101 U. S. 108.

In any view of the case, we are of opinion that the defendant in

error was not entitled to receive the rents sued for in this action. As this conclusion takes away the foundation of the suit, it is unnecessary to notice other assignments of error.

The judgment of the Circuit Court is reversed, and the cause remanded to that court for further proceedings in conformity with this opinion.

C. Account of Mortgagee in Possession.

ANONYMOUS.

CHANCERY, 1682.

[1 Vern. 45.]

A MORTGAGEE shall not account according to the value of the land, viz. He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful default: as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

WILLIAMS v. PRICE.

CHANCERY, 1824.

[1 Sim. & Stu. 581.]

The Vice Chancellor. The question here is, what is the degree of diligence which a creditor accepting from his debtor, by way of collateral security, the assignment of a judgment recovered by that debtor against a stranger, is bound to use for the purpose of enforcing satisfaction of that judgment. It is not necessary to determine whether such a creditor is bound, at all events, to use legal diligence to give effect to the judgment, or whether he may remain passive until required by the assignor to resort to legal diligence. Here the creditor, by suing out execution, assumed, as it were, the possession or control of this judgment in exclusion of the assignor, and is within the principle which charges the creditor in possession of property held by

him as a security, not only with what he actually receives, but with what he might have received but for his wilful default or neglect. I think it would be difficult to find a principle for charging such a creditor simply upon the ground that he gave time to the debtor upon the judgment; for it may be that the giving of time is a provident act, and affords the best chance of recovering the debt. In referring it to the master to take an account of what the defendant has received or might have received without his wilful default or neglect, in respect of the judgment debt assigned to him, I am, in truth, following the authority of Ex parte Mure, without thinking it necessary, for the purposes of this case, to adopt all the principles which are there stated.



SHAEFFER v. CHAMBERS.

CHANCERY, NEW JERSEY, 1847.

[2 Halst. 548.]

THE CHANCELLOR. On reading the testimony, I do not see any good reason why the report of the master should not be confirmed.

A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it, and of using the same diligence to make it productive that a provident owner would use.

If it be a farm, he is not at liberty to let it lie untilled because the house on it, or the house and farm together, were not rented. I see no reason why the farm should not be husbanded, though the buildings on it were not rented.

Again, a mortgagee in possession is not at liberty to permit the property to go to waste, but is bound to keep it in good ordinary repair, and if it be a farm, he is bound to good ordinary husbandry.

It appears by the testimony that, for several years of the time during which the defendant has been in possession, the property was not rented, and the whole of it, farm and all, was permitted to lie uncultivated. The master reports that it was not made satisfactorily to appear to him that the property was thus unoccupied without the default of the defendant. The ground here taken by the master raises this question: a farm of eighty-five acres, twenty-five of it in woodland, under mortgage, is taken possession of by the mortgagee, and rented. He remains thus in possession a number of years. Occasionally, during this period, the premises are vacant and the farm untilled. Is it sufficient for the mortgagee, thus in possession, in order to relieve himself

from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them, or should he be held to show proper diligence to procure a tenant? Is the mortgagor to prove that he might have rented it but for his wilful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in 1 Vern. 45; or does the fact of the premises being left vacant throw upon the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in Metcalfe v. Campion, 1 Moll. 238?

It seems to me that it will not do for the mortgagee, having thus taken possession, to fold his arms and use no means to procure a tenant; and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But, at all events, if the farm and buildings are not rented, he ought to cause the farm to be tilled, and that in a husbandlike manner.

From the testimony, I think the defendant has been negligent, to say the least, in the manner in which he has treated the premises. No provident owner would have treated them as he has. They have been permitted to go greatly out of repair, and the lands have been so badly husbanded that, for several of the last years, the whole premises, rented at first by the mortgagee for \$100, have rented for only \$60, and he has been charged but that sum.

The defendant, during several years, cut wood and timber from the premises, and sold it. The master, in stating the account, made annual rests when he found that the wood and timber, and the rents and profits, exceeded the interest and expenses, and applied the income, first, to the interest and expense account, and then to the reduction of the principal. This was objected to on the part of the defendant. It seems to me the master was right.

I am satisfied with the general result reached by the master.

Exceptions disallowed.

SANDERS v. WILSON ET AL.

SUPREME COURT, VERMONT, 1861.

[34 Vt. 318.]

POLAND, C. J. This bill was brought to foreclose a mortgage. executed by the defendant, Sanders, to the orator, on the 17th of April, 1852, of a farm in Bethel, which he purchased of the orator, to

secure the payment of a note of two thousand dollars, payable in ten years from date, with interest annually.

On the 9th day of August, 1855, the defendant, Sanders, conveyed the same farm to the defendant, Wilson, who assumed the payment of the note and mortgage to the orator.

In November, 1855, there being some interest due and unpaid on the mortgage note to the orator, he brought this bill returnable to the next December term of the court of chancery.

The defendant, Wilson, answered the bill, setting up that there was an outstanding mortgage upon the same farm of one thousand dollars, by the orator in 1845, and claiming that the same should be removed before the orator was entitled to a decree, or provided for in the decree so as to save his rights.

This outstanding mortgage was paid and extinguished by the orator in September, 1857, as is now conceded by the parties.

In the spring of 1856, the orator believing, as he says, that the defendant, Wilson, did not intend to pay and redeem his mortgage, entered into the possession of the mortgaged premises, and has since carried on the farm, and taken the rents and profits to himself, and the case now stands only upon the questions arising upon the accounting by the orator for such rents and profits.

The case was referred in due course to a master to take the account, who returned his report, stating the account for the years 1856 and 1857. The orator, before the master, professed to have kept, and produced, an accurate and minute account of all services and expenses incurred in carrying on said farm for said years, and the report states that it was made up wholly from the account thus rendered by the orator. The master reported that the farm was carried on in a prudent and judicious manner, that the charges for labor and expenditures were just and reasonable, and that the produce of the farm was sold to the best advantage, and all accounted for; in short, the report states a most faithful stewardship by the orator, and a full and honest accounting for all the avails and products. The reports of the master upon the accounts for those years, however, showed, instead of a balance of profits, the unhappy result of a net loss for 1856, of \$170.83, and for 1857, of \$204.55.

The cause was again referred to the same master to take the account for 1858, who reported the orator's account kept for that year, with similar favorable conclusions as to the orator's judicious and faithful management and honest accounting. The excess of loss for that year was \$127.68.

A further reference to the same master was made for 1859, who took the orator's account in the same manner, but upon the evidence, reduced his charges somewhat, and the balance of profits for that year amounted to the sum of \$26.21.

The result of the account for the four years showed a loss of \$476.85.

In the last of these reports the master states that the premises might have been rented for the sum of one hundred and fifty dollars a year, though he is of the opinion that the rents would have diminished from year to year under the occupation of tenants by the deterioration of the farm.

When the case came before the chancellor, the results of the orator's special accounting were so entirely unaccountable and unsatisfactory, that he refused to regard the same at all, but upon what the master reports as to the annual value, and other proof on that subject, allowed the defendant the sum of one hundred and twenty dollars a year, a sum just equal to the annual interest upon the principal of the mortgage debt. The defendant, Wilson, appealed from the decree, and both parties now claim that it should be reversed, and made more favorable to them. We entirely agree with the chancellor that the orator's special accounting before the master, and his finding upon it, are wholly unsatisfactory to the judgment, as forming any basis for a just and equitable decree. The premises were a valuable farm, the years were all years of plenty in general agriculture, and no reason appears for the peculiar and extraordinary result of the orator's management of the farm.

It may be accounted for, to a limited extent, by the great depression in the market for hops, as there appears to have been by the account quite an excess of charges above receipts, on the score of the hops; and this we do not doubt is true, as the state of the market for that commodity is a matter of public notoriety. But this furnishes no sufficient reason for the great loss on the whole farm, and for a series of years, and we are fully satisfied that there must have been a great failure either in the prudent and judicious management, and use of the premises, or in honestly keeping, and rendering the accounts before the master, and perhaps in both.

But we do not understand this to be the true rule and method of accounting for the rents and profits.

A mortgagee in possession is only bound to account for what he receives or might receive from the mortgaged premises by the use of fair, reasonable diligence and prudence, and if the premises are rented, and rents lost by the failure of a tenant, without fault of the mortgagee, he is not held liable to account.

But when the mortgagee himself occupies, and especially when the premises are a farm in cultivation, upon which labor and expenditures are to be bestowed, to produce annual crops, and profits, the mortgagee will be charged with such sums as will be a fair rent for the premises, without regard to what he may, in fact, have realized, as profits, from the use of it.

The rule is founded in sound policy, for the reason that the particular items of expenditure, in labor or otherwise, as well as the profits received, are wholly within the knowledge of the mortgagee, and if he is not disposed to render a full and honest account, it would

be impossible for the mortgagor to show them, or to establish errors in the mortgagee's account.

The necessity and wisdom of the rule were never, perhaps, more fully shown than in the present case.

It appears from the several reports and accounts appended, that the orator had expended considerable sums in improvements on the farm; in removing and repairing a barn, building a shed, hog pen, and new fences, more, we think, than can properly be regarded strictly as repairs.

When a mortgagee goes into possession of the premises, for breach of condition, with full knowledge of the right to redeem, and where there is nothing to show but that the mortgagor desires and intends to redeem, he has no right to expend the rents and profits for anything but such as are strictly necessary repairs. If he go beyond this, and make improvements, though they are such as are beneficial to the estate, and such as a judicious and prudent owner would make for the benefit of it, he will not be allowed for them, for if he might thus expend the profits in improving the estate, instead of applying them to keep down the interest of the mortgage debt, it might operate to clog, if not to wholly prevent the mortgagor from redeeming; and in all transactions between mortgagor and mortgagee, equity is watchful for the interest of the mortgagor, as the weaker party and the one who deals at a disadvantage.

In the present case, however, we think the fact that the orator has made improvements beneficial to the estate ought not wholly to be lost sight of, as enough of the rents and profits have, by the chancellor's decree, been allowed to keep down the interest on the mortgage debt, so that has not been increased while the orator has been in possession, and if the defendant redeems, he will receive and have the benefit of whatever erections and improvements the orator has made upon the mortgaged premises. It is also to be recollected that the mortgaged premises were subject to an annual rent of \$7.50, which the orator has paid, and for which, of course, he is entitled to be allowed.

Upon the whole, we are satisfied that the sum allowed by the chancellor is as near the true rule of justice as any we could fix upon, and that it effects substantial equity between the parties.

The chancellor also disallowed cost to the orator, of which the orator complains. This court will not, except under very special circumstances, disturb a decree merely on a question of costs. But we are satisfied fully with the decree in that respect. When the bill was brought the premises were encumbered by an outstanding mortgage from the orator, and we think the defendant had a right to ask that to be removed, or provided for, before the orator had a final and general decree of foreclosure. Since that was out of the way, the orator appears to have been persistently endeavoring to avoid a proper and just accounting for his administration of the mortgage

estate. These are sufficient equitable reasons for refusing him a decree for costs.

The decree of the chancellor is affirmed and remanded to be perfected.1

WHITE v. CITY OF LONDON BREWING COMPANY

CHANCERY DIVISION, 1889.

[42 Ch. D. 237.]

LORD ESHER, M. R. In this case the plaintiff, who is a small publican, took a public-house in the Isle of Dogs, and having no money with which to carry on business, he was obliged to borrow. In such a case it is usual to borrow from brewers, and the plaintiff borrowed from the. defendants the brewery company, to whom he gave a mortgage of his public-house to secure £700 advanced at once, and such further sums of money as they might thereafter advance, with a proviso that the sum recoverable under the security should not exceed £900. The business turned out a total failure. Thereupon the plaintiff's creditors issued writs against him, and those writs were put in the hands of the sheriff. Upon that the mortgagees, in 1869, exercised their right to take possession of the mortgaged premises. They had a right to take possession, and also a right to sell. They kept possession from the time they first took it until they sold, which was ten years later. Out of the money which they got on the sale, they paid themselves the money which they had lent to the plaintiff, and all the expenses to which they had been put by reason of their being obliged to take possession in order to protect themselves from what? - from the plaintiff's breach of his covenants. He had covenanted, of course, to pay interest, to keep the premises insured, to pay the rent, and to do repairs. Having paid themselves what they say they are entitled to, there was a surplus, and that surplus they would have handed to the plaintiff, but that he had mortgaged the premises to another mortgagee over whose security theirs had priority, so they paid the surplus to the second mortgagee.

Proceedings then were taken in the plaintiff's name, calling upon the brewery company to account for the purchase-money which they had received on the sale, and for the rents and profits during the time of their being in possession. That the proceedings in reality are taken in favor of the second mortgagee can hardly be doubted.

Everything in these proceedings was done in the worst form possible, and perhaps in strictness the case ought to be tried by us according to the ill form in which it is brought before us, but we do not like

¹ Accord: Mahoney v. Bostwick, 96 Cal. 53; Barnett v. Wilson, 54 Ia. 41; Turner v. Johnson, 95 Mo. 431; Still v. Buzzell, 60 Vt. 478. — Ed.

to determine people's rights by the ill form in which they have conducted their proceedings, if we can get at the substance of the case. If we were to deal with the case according to strict form, I apprehend that the appellant would have no chance at all, and would not before the learned judge below have got so much as he has. But disregarding the form, let us see what must be the rights of the parties. First of all, as I say, the nominal plaintiff had borrowed £700 upon a security that was to cover that sum and further advances, subject to a proviso which really came to this, that if they lent him more than £900 they should not be able to rely on the mortgage as a security for the excess. They have not lent him more than £900, and the amount named in the proviso not having been exceeded, we may, in my opinion, consider the matter as if there was no proviso at all. Then the plaintiff commits breaches of his covenants, and the company takes possession. Now they are bound to account to him after the sale — for the proceeds of the sale - for any rents which they have received, or but for their wilful neglect or default might have received, from the property while they were in possession - and for any profits which, during that period, they made out of and by the mortgaged property. They have not to account for anything more, and as against that they are entitled to set the expenses which they have fairly incurred in consequence of having been obliged to take possession, and keep possession, and to sell. They have a right to set off against the sale the expenses of the They have a right to set off against the rents and profits they have received any rents they have been obliged to pay (inasmuch as this was leasehold property), and any insurance they were obliged to pay, and anything else which was an expense put upon them by reason of their being obliged to take and keep possession - expenses which they were obliged to incur in order to receive the rents and profits which they are to account for.

But the nominal plaintiff says: "No, you must account to me for the profits which you have made upon beer which you have supplied to the house, as being part of the rents and profits which you have got out of the mortgaged property." Can those profits on beer supplied to the house be said to be profits by and out of the premises? Such an idea seems to me simply preposterous, and we cannot entertain it. Has anybody ever thought that such profits were to be brought into the account? Mortgages of beer-house premises are of everyday occurrence, and the failure of the mortgagee to repay the brewer is a matter of every other day occurrence. Have the publicans who have fallen by the way in such numbers ever thought of raising this ques-Neither did this man. It is the second mortgagee tion? Not one. who thought of this. I suppose somebody has put this experiment into his head; it is an experiment which failed in the court below, and which fails here.

The question as to profits on beer was the real fighting part of the case, and if the learned judge had refused to consider anything else in

the matter nobody could have objected. The plaintiff was playing for high stakes. He did not care about the difference of rent, he wanted £1,990 to be brought in and then his surplus of a little less than £400 would have been nearly £2,400. If a man plays for such high stakes and utterly fails, I feel inclined to say, "You cannot turn round when you have failed on that, and say you are entitled to a trifling advantage on another view of the matter." But the learned judge took a more indulgent view and said to the mortgagees: "You took possession of the property, and you let the property; you were bound to the mortgagor to let it for a fair rent; you had no right, for instance, to let those premises for nothing, and then make a profit out of supplying beer to them. If you did not let the property for as good a rent as you could reasonably get, you ought to account for the difference between what you did let it for, and what you ought to have let it for." The learned judge dealt with the matter upon that footing, and if he was to deal with it at all, that was the right footing. What the fair rent was is a matter of evidence, and the evidence here is as bad as the pleading; it goes to every point except the real point in the case. Now does the evidence show that the mortgagees let this house at any time for a less rent than they ought to have got? For the first two years they kept it in their own hands. There is no question but that they had a right to keep it in their own hands, and the evidence is that if they had tried to let it at the time when they took possession they could not have got a tenant. The brewers then put in Moulton as their servant, and the value of the business is carried from nothing at all, by their money and by their servant, to something. After this Moulton takes the house at a rent of £30 for the first year, and £40 for the next, and he was to take his beer from them. He found that he could not make anything of it, and asked them to reduce his rent to £30, and half of that was for furniture which belonged to the company. The evidence is clear that nobody at that time would have given more. In 1873 Hake came at a rent of £60, and the evidence is that nobody would at that time have given more than he gave. The learned judge came to the conclusion that from the year 1874 to the year 1879 the property was let for a less rent than might have been got if there had been no stipulation to take beer from the company, and there being no evidence given on behalf of the plaintiff what amount of rent ought to have been got, the learned judge was obliged to make a guess, and he allowed £20 a year. If he had given only £10, the plaintiff could not have complained. He has got £100, which will go perhaps to assist the second mortgagee to pay the costs for which I have no doubt he is liable, and with that he must be content. The appeal must be dismissed.1

¹ Compare: Parkinson v. Hanbury, L. R. 2 H. L. 1; Peugh v. Davis, 113 U. S. 542. — Ed.

ENGLEMAN TRANSPORTATION CO. v. LONGWELL.

CIRCUIT COURT, UNITED STATES, 1880.

[48 Fed. 129.]

IN EQUITY. On an accounting.

WITHEY, J. Mrs. Longwell, one of the defendants, a mortgagee in the possession of the undivided half of premises, the conveyance being absolute in form, has been required to account for the net rents and profits. It turns out that she has received from one of the two parcels of real estate no rent, and claims, therefore, that she is not chargeable The title of an undivided half of the property, upon the face of the records of the county where the property was situated, was in Mrs. Longwell. Defendant Sherman owned the other half. gave him a mortgage on her half to secure one-half of the costs of repairs which he made on one parcel of the property; Sherman agreeing to carry on the business of milling and flouring for five years from September, 1875, and pay to Mrs. Longwell one-quarter of the net profits, she to bear one-half of the losses, if any. Her quarter of profits Sherman was to apply towards paying her share of the advances made by him, secured by the mortgage on her undivided half. The business of milling proved disastrous. Instead of a profit, there was a loss: consequently there was no reduction of the mortgage given to Sherman.

Now it is claimed that Mrs. Longwell is not chargeable with any rents whatever, as she received none. We regard this view to be a misapprehension of the rule under the facts. Mrs. Longwell, as mortgagee in possession of the undivided one-half of the mill property, would not be accountable for rent if she had been unable to lease the property, or had failed, after judicious leasing, to collect rent; but when she entered into a partnership arrangement with Sherman to do a milling and flouring business with this mill property, (the rule would be the same if she had alone carried on the business,) and the venture turned out disastrously. a court of equity will not inquire, under such circumstances, whether there was profit or loss, but will charge her with the fair rental value of the premises over repairs, insurance, &c., and taxes paid. is therefore directed to ascertain what the fair net rental value of the undivided half of the mill was during the period of the accounting, in the condition it was after the improvements were made, and credit her with the cost of her share of the improvements beneficial to the freehold.

ROBERTSON v. READ.

Supreme Court, Arkansas, 1889.

[52 Ark. 381.]

HEMINGWAY, J. This is a suit by the widow and heirs at law of one Bob Robertson, against Brass Robertson, his brother, to establish a trust in a tract of land.

The material facts of the case are as follows: In 1871 or 1872 one Thomas Trotter sold the land to Bob Robertson, on a credit, for \$660, giving his title bond and taking notes for the purchase money, bearing interest until paid at 10 per cent per annum. Bob Robertson entered into possession and occupied the land as a homestead, Brass, who was younger, living with him. Bob paid \$160 on the notes. In 1874 he fled the country, leaving his wife, children and brother in possession of the land. In 1875, after the last of the purchase money notes had matured, Trotter notified Brass that unless they were paid, he would proceed against the land. Brass procured the title bond from Bob's wife, and returned it to Trotter, who, intending to cancel the sale, destroved it and the notes. The payment made by Bob liquidated the interest, but did not reduce the principal of his debt. Brass and Bob's family remained upon the land during 1875 as tenants of Trotter. About the close of that year Trotter sold the land to Brass. He paid part of the price in cash, and gave his notes for the balance; he received a bond for title. He subsequently paid the notes. It does not appear from the evidence that Brass acted otherwise than in good faith, either in attempting to cancel the bond to Bob, or to acquire title to himself. When he purchased there was due on Bob's notes \$660; and there were twenty acres of the land in cultivation of the rental value of three dollars per acre per annum. The land is not shown to have had any other rental value. Brass subsequently cleared more of the land and made other improvements; he asks that he be paid therefor in case his title fails.

The court below found that Brass had received assets from Bob to apply on his notes, which, with the rents received by him, was sufficient to extinguish them. As to such assets the testimony is very indefinite and unsatisfactory, and we cannot find that any were received by Brass for that purpose.

The effect of the title bond to Bob, was to vest in him an equitable title to the land, and to retain in Trotter the legal title as security for

the purchase money. The return of the bond to Trotter was made without Bob's knowledge or consent; such being the case, Trotter did not acquire Bob's title by its delivery to him and the destruction of the notes.

When Brass took possession under his purchase, he held not as owner but as mortgagee, being subrogated to Trotter's right as such. Teaver et al. v. Eakin, 47 Ark. 528.

A mortgagee is not entitled to be paid for improvements made upon the mortgaged premises, further than is necessary to keep them in repair. The improvements may be of permanent benefit to the estate, but unless made with the consent and approbation of the owner no allowance can be made for them. The mortgagee has no right to increase the burden of redeeming. If he chooses to make improvements, he may enjoy their use during his possession, but upon redemption they inure to the benefit of the estate. Jones on Mort., sec. 1127.

A mortgagee who himself occupies the premises, especially if they consist of a farm, upon which money and labor must be bestowed to produce annual crops, is chargeable with such sums as are a fair rent of the premises (Jones on Mort., sec. 1122); but he should not be charged an increased rent, caused by improvements upon the land for which he is denied compensation. Justice is done by charging him with the rent which the land would have yielded as it was without his improvements. To the extent that the rental value is increased by them, he should not be held to account. Jones, McDowrell & Co. v. Fletcher, 42 Ark. 456; Tatum v. McClellan, 56 Miss. 352; Jones on Mort., sec. 1127, and cases cited.

The question of limitation was not raised by the pleadings of appellant nor considered by us.

The appellees are entitled to redeem the lands upon paying to appellant the amount due on Bob's notes. He should be credited by the sum of \$660, the amount due on the notes when he purchased, less \$60, the rent for 1875, with interest from January 1, 1876, at 10 per cent per annum; but he should be charged with the sum of \$60 for the rent of the land for each year beginning with 1876, which should be credited at the end of each year on the amount due him. If the appellees pay the sum so due him, they are entitled to have the title vested in them; if they fail to pay it within a reasonable time, the land should be sold to satisfy it.

The judgment is reversed, and the cause remanded for a decree and proceedings thereunder, in accordance with the law as herein declared.

RUSSEL v. SMITHIES.

EXCHEQUER, 1792.

[1 Anstr. 96.]

On a bill of foreclosure, it was referred to the Deputy Remembrancer to take an account what the mortgagee had received from the rents, &c., or might have received, without wilful neglect in her. It appeared that the premises (malt-houses, &c.) had been allowed to fall so much out of repair, that the rent fell from £22 to £18. Plaintiff had done some repairs, and had held forty years.

By the Court. The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that after forty years' possession, the mortgagee is bound to leave the premises in as good condition as he found them.

CAMPBELL v. MACOMB.

CHANCERY, NEW YORK, 1820.

[4 Johns. Ch. 534.]

A PETITION was now presented, on the part of the plaintiff, Campbell, stating that he is personally bound, as collateral security, to the trustees of the charity school, for the payment of the bonds and mortgages. That he holds two judgments against the defendant, Macomb, for moneys advanced, and for his indemnity as such security. That the other defendants were owners of the equity of redemption. That Macomb is insolvent, and the dam much injured by a storm, since the filing of the bill, and now in danger of being destroyed. That the security for the principal of the mortgage debts is much impaired. That the defendants, who were then owners of the equity of redemption, agreed to the decree of sale. The petitioner concluded with a prayer that the defendant, Macomb, or Mowatt, be ordered to give security to repair the dam, or to repay the mortgage debt with interest, or that the order staying the sale be vacated.

THE CHANCELLOR. I cannot make it a condition of the order, staying the sale, that the defendant should repair the dam. This would be a very extraordinary and dangerous interference with the exercise of the rights of a mortgagor, and is, in practice, unknown. Suppose the most valuable part of the mortgaged premises should consist of buildings, and they should accidentally be destroyed by fire, can the mortgagor be compelled immediately to rebuild? Is it not rather encumbent on the mortgagee, or the surety, to provide for such a case in the

contract, or by insurance? It would bring distress and ruin on a mortgagor to charge him with burdens and duties not within the contemplation of his contract, and therefore not within his provident fore-How far the court could or ought to interfere in a case of negligent or permissive waste, rapidly impairing the security, is a question which need not now be discussed; for the relief, if any, would not be by directing the mortgaged premises to be sold for a debt not due, or, under a decree of sale, to give an order to repair, or a reference to assess damages. The necessity of any interference of any kind, in cases of mortgages, is exceedingly diminished by the consideration that the mortgagee can, if he pleases, relieve himself by obtaining possession of the land, and make, at his own expense, the requisite repairs, for which he would be allowed, in account, when the mortgagor came to redeem. It is also stated, in this case, that the present owner of the equity of redemption is in the act of repairing the dam: and it is so evidently his interest to do it, and his payment of the interest due on the mortgage, together with the costs, is such decisive evidence that the property is considered to be worth more than the debt charged thereon, that I should infer there was little or no foundation for the alarm discovered in the petition.

Motion denied, with costs.

SANDON v. HOOPER.

CHANCERY, 1848.

[6 Beav. 246.]

This was a suit for an accounting and a redemption.

THE MASTER OF THE ROLLS. It is objected on behalf of the plaintiff, and properly objected, that so far as the sum of £140 consists of the bill of costs, which is payable to the defendant, it ought only to stand as a security for so much as will be properly due upon taxation. That is not disputed by the defendant; it has been very properly conceded to the plaintiff, that he is entitled to have that investigated.

In the year 1838 the defendant obtained possession by an action of ejectment, and after he came into possession he pulled down two of the cottages which were upon the premises, and he says, in his answer, that he laid out a considerable sum of money, to the amount of about £300, for repairs and substantial improvements, which he alleges were done with the privity and knowledge of the plaintiff. First, with respect to the dilapidations, they are proved; and there is not an attempt made in evidence for the purpose of showing that it was proper. I am therefore of opinion that the plaintiff is entitled to an account of any loss occasioned by pulling down those houses.

The next question is, whether the plaintiff is entitled to anything

for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times, showing what he ought, and, to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs. but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice, in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving a mortgagor out of his estate — an expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property.

Now, in this case, it has also to be considered whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the court. I quite agree with the argument that has been used on this occasion, that it was not necessary for the defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made; but, in this case, there is, as to that, a total absence of all evidence whatever. There is evidence, on the part of the plaintiff, to show that what was done deteriorated the property, and there is not one word in evidence, on the part of the defendant, in support of his allegation that he has laid out any money for lasting improvements, or that anything he did was done with the privity, consent, or knowledge of the plaintiff. the absence of all proof, it is not at all within my authority to direct an inquiry to enable him to supply that in the master's office which he has already had an opportunity of doing. He may have done something towards the improvement of the estate; and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the court to direct an inquiry upon the subject; but there is no such proof brought forward.

Another point has been raised in this case as to the refusal of the defendant to account. To excuse his refusal, the defendant alleges that he was under a mistake as to the party on whose behalf the application was made; but I think the circumstances sufficiently show there

was no mistake.

Under these circumstances I shall direct no inquiry as to lasting improvements: I think the plaintiff is entitled to an inquiry, as to the loss sustained in consequence of pulling down the cottages: he is entitled to a taxation of the bill of costs, which form part of the consideration for the further charge; and, considering the course the defendant has taken, I think he is liable to pay some of the costs of this suit. I cannot, however, take it for granted that this suit would not have occurred if the estate had not been dealt with as it appears to have been; I cannot, therefore, say that the plaintiff is to be excused from the whole costs of the suit up to the hearing. I think the plaintiff must pay the costs, except those which relate to the claim for lasting improvements, -- those relating to the plaintiff's claim for compensation for the dilapidations, and those which have arisen from the evidence, which the plaintiff has been obliged to enter into for the purpose of showing the refusal to account. There must be an inquiry taken of what is due to the defendant for principal and interest, and for the costs payable by the plaintiff.

Mr. KINDERSLEY asked for the costs of the action of ejectment.

THE MASTER OF THE ROLLS. The plaintiff is entitled to those costs: that has often been decided.

GODFREY v. WATSON.

CHANCERY, 1747.

[3 Atkyns, 517.]

Lord Chancellor said, that a mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if a mortgagee has expended any sum of money in supporting the right of the mortgager to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it shall carry interest.

He also said, a mortgagee shall not be allowed for his trouble in receiving the rents of the estate himself, but if an estate lies at such a distance from the place of his residence, as he must have employed a bailiff, if it had been his own, he shall then be allowed such sums as he has paid to a bailiff, to receive the rents of this estate.

SHEPARD v. JONES.

CHANCERY DIVISION, 1882.

[21 Ch. D. 469.]

By an indenture of transfer of mortgage, dated the 31st of January, 1874, the Victoria Brewery and other hereditaments at Wrexham were conveyed to the defendant, Edward Jones, for securing £2,000, subject to redemption by Thomas Manby. By subsequent deeds further sums of money were charged on the same premises.

On the 10th of October, 1878, Thomas Manby was adjudicated bankrupt, and the plaintiffs, H. Shepard and H. Davies, were appointed trustees of his estate.

On the 18th of February, 1879, the defendant offered the mort-gaged property for sale by auction under the power of sale in his mort-gage, but no bidding was made for it. Several persons also inspected the brewery with a view of purchasing it by private contract, but declined to do so, alleging as their objection to it the inadequate supply and inferior quality of the water in the well on the premises.

In August, 1879, the defendant took possession of the brewery, which was then vacant, and placed a person in it to take care of it, but did not himself occupy it.

In the early part of the year 1880 the defendant commenced boring operations to deepen the well, and eventually obtained a good supply of water. The defendant alleged that this was done with the knowledge and acquiescence of the plaintiffs.

On the 12th of May, 1880, the defendant again put up the mort-gaged premises for sale by auction, when it was bought by David Johnson for £5,000, one of the conditions being that the sale should be completed on the 29th of September following. At that time the principal sum of £4,000 and a considerable arrear of interest were due to the defendant.

The defendant let the purchaser into possession of the brewery soon after the sale without requiring any rent from him, but the purchase was not completed nor the purchase-money paid on the 29th of September.

The purchaser was not a brewer but a manufacturer of zoedone, and used the premises after taking possession as a storehouse for his goods.

The defendant tendered to the trustees £509 18s. 4d., which he considered to be the balance due to them, but they declined to accept it. They claimed in addition rent for use and occupation from the time when the defendant took possession till the 29th of September, 1880, and they also refused to allow the expense to which the defendant had been put to in deepening the well, amounting to about £83.

The plaintiffs then brought this action against the defendant, claiming the balance of the purchase-money, and asking for accounts against the defendant as mortgagee in possession. The defendant paid £544 $17s.\ 2d.$ into court.

At the trial the above-mentioned facts were proved, but there was a conflict of evidence whether the plaintiffs had notice of and acquiesced in the deepening of the well.

COTTON, L. J. The question here is whether the defendant, the mortgagee, ought to have been declared entitled to an inquiry as to the expenditure incurred by him, which he says was an improvement to the property. Undoubtedly, a mortgagee has no right as against a mortgagor to improve the mortgagor out of his property, and if he lays out a very large sum that is in itself a thing which he has no right to do. A mortgagor must not be prevented from redeeming by the mortgagee when in possession throwing a great burden upon him.

We have not to consider any such objection in the present case. This property has been put up for sale by the mortgagee, there being no prospect of redemption in the sense of payment off of the mortgage money; there was difficulty in the first sale, and certainly in one sense a probable bidder was deterred from making a bid or becoming a purchaser by the deficiency of the water supply. That was probably a deficiency in quality as well as in quantity. Then, with the intention of putting it up again for sale, the mortgagee bores and increases the water supply, and then it is put up again and it is sold. Now upon this evidence I think there is at least a prima facie case that what was done increased the saleable value of the property. Even although the quality of the water might not be improved, yet an addition to the production of the well, especially if the property is to be used as a brewery, would prima facie be an addition to the value, and be a matter that would encourage persons to come and bid. In a case of this sort, where there has been no alteration in the nature of the property, which a mortgage must not make, but merely an expenditure prima facie increasing the saleable value of the estate for the purpose for which it was intended, it is in my opinion, if it can be shown that there has been an increase in the saleable value of the estate, an expenditure which the mortgagee is entitled to have repaid to him as a reasonable expenditure. It is a matter which reasonably might be done for the purpose of improving the actual state of the property, not an alteration, but improving it for the purpose of carrying out the object of the mortgagee, namely, to realize it by a sale. That being so, I have not anything to say about what might happen in any other case. But here, in my opinion, the mortgagee has made out a prima facie case that his expenditure was reasonable in amount, and reasonable with reference to the existing purposes of the property, and such as to entitle him to an inquiry by showing prima facie that he increased the value of the estate for the purpose of the sale.

In my opinion, therefore, there ought to be the inquiry suggested by the Master of the Rolls, which, of course, will be at the risk of the mortgagee, who, if his prima facie case breaks down, and he does not establish that the saleable value of the estate has been increased by his expenditure, will have to pay the costs of the inquiry. I think he has made out a prima facie case. He will be entitled to his expenditure so far as it has increased the saleable value of the property, but of course not to more than he has expended.

The other point is a short one. The mortgagee complains that he has been charged with an occupation rent during a period of time intervening between his sale and the time fixed for the completion of the purchase. How was he in occupation? It is obvious that you cannot charge a man with an occupation rent, unless he is in occupation. He was not actually in occupation either by himself or by any servant of his; but it is said that he is to be considered as in occupation, because without any right under the contract the purchaser, with his permission and assent, took possession of the premises. In my opinion, that occupation of the purchaser can in no sense be considered in law the occupation of the mortgagee, the vendor, so as to charge him with an occupation rent. If anything is to be charged, it would be for wilful default. I do not enter into that, and I give no countenance to the suggestion that there was wilful default. I have heard no evidence which shows there has been wilful default. What we have to consider is whether an occupation rent can be charged during that period. In my opinion this purchaser was in possession as purchaser, and not in such a way as to make his occupation that of the defendant, either as mortgagee or vendor. Under those circumstances the mortgagee whatever else, if anything, he may be liable for during that period, cannot, in my opinion, properly be charged with an occupation rent.

McCUMBER v. GILM

SUPREME COURT, ILLINOIS, 1854.

[15 Ill. 381.]

CALVIN McCumber, the ancestor of the complainants, on the fourth day of August, 1842, purchased from Joel Walker lot two in block seven, in Walker's addition to Belvidere, for \$100, and took a bond for conveyance of the lot, on payment of the money in one and two years, with interest, payable annually, for which McCumber gave his notes. McCumber paid the first of these notes and a part of the other before his death.

McCumber borrowed of Gilman \$600 in Illinois internal improvement scrip, drawing interest; to secure the repayment of which, with interest at three per cent per annum upon the \$600, he gave his note, and a mortgage on the lot in question. This note and mortgage were made after the last note given for the payment of the lot had become due.

On the 16th of August, 1845, McCumber died intestate, leaving a widow and the complainants his heirs, returned to probate court \$125, which was set off to widow. The estate owed debts, as proved, amounting to \$220, not including the notes to Walker and Gilman.

The mortgage to Gilman was acknowledged and recorded in September, 1844.

After death of McCumber, Gilman sued out scire facias to foreclose his mortgage, and took judgment in April, 1846, for \$240. The premises in question were sold on this judgment for \$393.07, and Gilman became the purchaser; the redemption expired, and Gilman took a deed from the sheriff. Walker, by order of a decree in chancery, conveyed the lots in question to Gilman. In the spring of 1849, Gilman made improvements on the premises by removing a wooden building, variously estimated from \$25 to \$100, and erecting a new building in its place; by laying new floors, putting on blinds, &c.

The decree was rendered by J. G. Wilson, Judge, at April term, 1854, of the Boone Circuit Court.

CATON, J. The case of McCumber v. Gilman, reported in 13 Ill. 543, disposes of all claim which the defendant could assert under the judgment of foreclosure, which was there reserved, and leaves him simply in the position of a mortgagee in possession for condition broken, and leaves nothing to be decided in this case except to determine how much he shall be entitled to for repairs or improvements which he has put upon the premises during his possession. The rule on this subject has been as well settled by this court as its nature will admit. It is not only the right, but it is the duty of the mortgagee in possession to put upon the premises all necessary and proper repairs to prevent them from going to waste, and to reimburse himself out of the rents and profits, unless, indeed, the condition of the premises would make it injudicious to make such repairs. Circumstances might exist where it would be better for the estate to abandon the improvements altogether, than to repair them. In such a case, the court could not sanction an expenditure thus injudiciously made. But the rule does not admit the mortgagee in possession to make new improvements at the expense of the estate; although circumstances may exist which will authorize the court, in stating the account, to allow the mortgagee for new improvements which he was in strictness not authorized to make at the expense of the mortgagor. McConnel v. Hallobush, 11 Ill. 61. In that case an allowance was directed to be made for new improvements, provided certain facts should be established upon a further hearing. The facts further to be established were indicated in

the opinion of the court, as follows: "Were we convinced that the improvement was made in good faith, the defendants believing they had made a valid purchase of the premises, and that the expenditure was a judicious one for the benefit of the estate, we think they should be allowed for them." In this case there is no doubt that the improvements were made in good faith, the defendant believing that he had made a valid purchase of the estate, and that he was expending his money upon his own absolute property. He purchased it under a indement of the circuit court foreclosing this same mortgage, and after the time allowed for redemption had expired he took a sheriff's deed, and we have no reason to doubt that he supposed his title good. Under this supposition he made the improvements, and with himself as owner, it may be very true that the improvements were quite judicious and proper. But it by no means follows that counselling the estate as belonging to the heirs of McCumber, the new improvements were judicious and proper. Indeed it is very manifest that they were not, especially as to the new stone house which the defendant erected on the premises. The propriety of the expenditure must be determined with reference to the circumstances of the heirs of the mortagagor, for it was upon their estate that the improvement was made, and it is against them that the expense is sought to be charged. It is a very hard, if not an unjust rule, which in any case makes one a debtor against his will; and it is very clear that it should never be done, unless it is manifestly to his advantage, as well as just and proper as to the other party. Were we to consider the case of Gilman alone, there can be no doubt that he should be compensated to the extent of the enhanced value of the premises by reason of this expenditure; but when we consider the situation and circumstances of the complainants, there can be no doubt it would be great injustice to them to impose such a burden upon them. It would be equivalent to denying them any relief whatever. Their father died, leaving no estate whatever to these infant children except this house and lot, encumbered with this mortgage of about \$165, and leaving other debts amounting to about \$220. The value of the premises was about \$500, and were then worth about \$65 a year in rents, but were fast going to decay. The defendant took possession, and not only put the house which was on the premises in thorough, though not extravagant repair, but he put a new fence upon the lot, and removed a wooden kitchen which was attached to the back part of the brick house, and worth from \$25 to \$50, and in its place erected a new stone house, at an expense in the whole of about \$1,200, which he now insists the defendants shall pay him before they shall be allowed to redeem the premises from the mortgage which their ancestor agreed to pay him, and to satisfy which alone he had a right to take the possession. The case has to be but stated to show that, to allow it, is equivalent to depriving the heirs altogether of their rights and interests in the premises; for it is perfectly manifest that it is utterly out of their

power to redeem the estate from the mortgage and to pay for these improvements. No court, and no judicious individual having charge of the estate and the interest of these infants, could have sanctioned such an expenditure at the time it was made, knowing that it was to be charged to them when they should come to redeem, and knowing that they had nothing in the world with which to pay it. improvements must have been proper and desirable as to them and in their circumstances, before they can be pronounced judicious and the estate charged with them. And at least as to the new house or addition, and the new fence, we are of opinion that the rules of law do not admit of their allowance. The defendant's claim for improvements is not a matter of strict right, and hence to determine its justness we must consider the position of the other parties; and when this is done, we see at once that to enforce a claim against them for benefits which have been volunteered to them, and to which they have never given the least encouragement, would, in all probability, deprive them of a clear right, without any fault or act of theirs. We are of opinion that the court erred in requiring the complainants to pay to the defendant the value of the new improvements which he placed upon the premises while they were in his possession. There is serious doubt whether even the repairs put upon the brick house were not more extensive than were strictly necessary to preserve the estate from waste and make it tenantable, and more than were strictly judicious. when we consider the circumstances of the complainants; but upon the whole, we have thought it proper to direct that they should be allowed to the defendant in taking the account. I have looked through the evidence with some care, with the hope of being able to make up a satisfactory account between the parties, and thus save the expense and trouble of another reference, but find that I am unable to do so. Hence we must confine ourselves to laying down the principle upon which the account should be stated. The suit must be remanded, with directions that the defendant be allowed the value of the repairs placed upon the brick house alone, including the cellar and well, and also all taxes paid by him upon the premises, as well as the amount due upon the mortgage. The evidence in this record does not show that he has paid the balance due from McCumber for the purchase of the lot. Should he establish by proof that he made such payment, prior to the time when he obtained the title from Walker, he should be credited with the amount thus paid and interest thereon from the date of payment. If he has kept the property insured, for that he should be credited also. He should be charged with the value of the rent of the premises, exclusive of the new improvements which he has put upon them and for which he gets no allowance in making up the account. The value of the rent is to be estimated of the premises with the repairs for which he receives a credit. The rents to be applied in extinguishment of the taxes paid, repairs, &c., first, and should any balance remain, then towards the interest due upon the

mortgage, and then the principal; annual rests being made in the computation. Or if the amount paid for taxes, repairs, &c., should exceed the value of the rents, interest may be allowed upon the excess. No charge to be made for the wooden shed or kitchen removed.

The decree must be reversed, and the suit remanded, with directions to the circuit court to proceed conformably to the principles of this opinion.

Decree reversed.

CHAPTER V.

THE SITUATION OF THE MORTGAGOR.

SECTION I. -- OWNERSHIP.

A. Suits involving Ownership.

PARTRIDGE v. BERE.

KING'S BENCH, 1822.

[5 B. and Ald. 604.]

Action for diverting a watercourse. The declaration contained an averment that a certain close was in the possession and occupation of one John Turner, as tenant thereof to the plaintiff, the reversion belonging to the plaintiff. At the trial before Park, J., at the last assizes for the county of Devon, it appeared that Turner, being tenant for life of the close mentioned in the declaration, in March, 1817, had mortgaged the same to the plaintiff for £100, for a term of years, provided he, Turner, lived so long, and that Turner had since that time continued in possession and paid the interest. It was objected on the part of the defendant, that the relation of landlord and tenant did not subsist between a mortgagor and mortgagee, and consequently, that the averment was not supported by evidence; the learned judge overruled the objection; and now

Adam moved for a new trial, and contended that there was no tenancy, there was no payment of rent, but of interest; and he relied on the opinion of Buller, J., in Birch v. Wright, 1 Term. Rep. 382.

PER CURIAM. Here the mortgagor was in actual possession of the mortgaged premises, by sufferance of the mortgagee, who has the legal title vested in him. The former, therefore, is a tenant within the strictest definition of that word.

Rule refused.

WILLINGTON v. GALE.

SUPREME COURT, MASSACHUSETTS, 1810.

[9 Mass. 138.]

This was an action of entry sur disseisin, in which the demandant counted upon his own seisin, and on a disseisin by the tenant. Trial was had upon the general issue, and a verdict being found for the tenant, the demandant moved for a new trial for the misdirection of the judge.

From the judge's report it appears that the tenements demanded were under mortgage; but neither the mortgagee, nor any under him, had entered for condition broken. The equity of redemption was regularly seized upon execution against the mortgagor, and legally sold by the sheriff to the demandant in fee, who received a regular deed of conveyance from the sheriff, duly executed, acknowledged, and recorded. This was the evidence of the demandant's title.

The tenant entered, not claiming under the mortgagee, nor as a disseisor of the mortgagor; and the judge's opinion at the trial was, that the demandant must prove an actual entry after his conveyance, in order to maintain his action. Such evidence not being produced, the jury returned a verdict for the tenant. And this opinion of the judge was the ground of the motion for a new trial, which was briefly argued at the last October term in this county, by Ward and Fay in support of the motion, and Bigelow in favor of the verdict, and the action being continued nisi from the present term, the opinion of the court was delivered at the following November term in Suffolk, by

Parsons, C. J. The mortgagor, after his mortgage, still continues the owner of the land, and seised of it against all persons but the mortgagee, or those who claim under him; and he has therefore a right to convey the estate mortgaged, defeasible only by the mortgagee, or some person having his right; and if he conveys, thus having a right to convey, by deed executed, acknowledged, and registered, the purchaser shall be deemed actually seised, without entry or livery of seisin.

The statute of 1798, c. 77, which makes rights in equity, of redeeming real estate mortgaged, liable to be seized and sold on execution, provides that the sheriff's deed shall convey the debtor's right in equity to the purchaser, his heirs and assigns, in the same manner as if the debtor had executed the deed.

The purchaser thus having a legal right to the equity of redemption, has also a legal seisin of the land, when neither the mortgagee nor his assigns have entered, subject, however, to their claim; and may maintain a real action against any stranger, unless such stranger had, in fact, disseised the mortgagor before the sale of the equity. But the tenant in this case does not claim as a disseisor of the mortgagor; against

him, therefore, an actual entry, in our opinion, was not necessary; and in this opinion the judge, who tried the cause, upon further consideration, concurs. The verdict must be set aside, and a new trial granted.

BRADY v. WALDRON.

CHANCERY, NEW YORK, 1816.

[2 Johns. Ch. 148.]

THE bill was filed by the plaintiff, a mortgagee, for an injunction to stay waste in cutting timber on the mortgaged premises, whereby the land would become an insufficient security for the debt. There was no suit pending for a foreclosure.

THE CHANCELLOR. An injunction lies against a mortgagor in possession to stay waste. The court will not suffer him to prejudice the security. 1 Dick. Rep. 75; 3 Atk. 210, 237; 3 Vesey, 105.

Injunction granted.

CLARK v. REYBURN.

SUPREME COURT, KANSAS, 1863.

[1 Kans. 281.]

A STATEMENT of the facts of the case appears in the opinion of the chief justice.

By the court, Cobb, C. J. The defendant in error brought his action in the district court against the plaintiffs in error to recover a dwelling-house as personal property; alleging in the petition that he is the owner thereof, and the defendant detains the same and recovered judgment.

The undisputed facts of the case are these:

One Brown and his wife mortgaged a parcel of land to Amos Rees, and the plaintiffs below afterwards became the owners of the mortgage by assignment, and after the making of the mortgage, said Brown placed a house on the land, and after the money secured by

the mortgage became due, and before foreclosure, still being in possession, he and his wife sold the house to one Mrs. Fritzlin, who sold it to the defendants below, and removed and delivered it to them off the mortgaged premises. They held possession under her title, and the mortgage had not been paid nor foreclosed when the action was commenced. The judgment must be founded on the hypothesis that the plaintiff below, by virtue of his mortgage, was the owner of the freehold of which the house in question was a part, and that the removal of the house converted it to a chattel without devesting his title. Is that hypothesis correct?

It has long been settled, both in this country and in England, that the mortgagor, both before and after breach of the condition of the mortgage, is, in equity, the owner of the estate, and the mortgage a mere security for a debt. See Kent's Com., vol. iv., p. 158, et seq.

The rule at law has been the subject of much judicial discussion and conflict of opinion. But it is believed to be the settled modern doctrine that the mortgagor in possession is, at law, both before and after breach of the condition of the mortgage, the legal owner, as to all persons except the mortgagee and those claiming under him. And in States where the common law on that subject has not been changed by statute, the mortgagee, for the purpose of protecting and enforcing his lien against the mortgagor, has the remedies of an owner, he may enter into and hold possession and take the rents and profits in payment of his mortgage debt and may have his action of ejectment to recover such possession, and hence is sometimes called the owner. But except as to such remedies, and as to all persons except the mortgagee, the mortgagor in possession is to be regarded and treated as the owner of the estate, subject to a mere lien or charge. 4 Kent's Com., p. 160; Perkins v. Dibble, 10 Ohio, 438; Rallston v. Hughes, 13 Ill. 568; Howard v. Robinson, 5 Cush. 123; Norwich v. Hubbard, 22 Conn. 587; Astor v. Hoyt, 5 Wend. 615.

And in this State the legislature has not enlarged, but still further restricted the rights of the mortgagee, by providing that "in absence of stipulations to the contrary, the mortgagor of real estate may retain the right of possession thereof." Com. Laws, p. 355, § 12.

According to the principles above laid down, it is manifest that the allegation of the petition below, that the plaintiff is the owner of the house, was entirely unsupported by the facts appearing on the trial.

Nor is this objection to the judgment technical.

If such an action can be maintained, a mortgagee may recover from the purchasers all the timber, stone, or other property severed from the realty and sold by the mortgagor, though its value may exceed the mortgage debt an hundred fold, and however ample the security may remain; although it is quite clear on principle and authority that the purchaser of property so removed by the mortgagor, cannot be liable in an action for the waste beyond the actual

loss the mortgagee thereby sustains. Van Pelt v. M'Graw, 4 Conn. 110; Gardner v. Heartt, 3 Denio, 232; Lane v. Hitchcock, 14 Johns. 213, 15 Johns. 205.

The other points made in the case need not be examined.

The judgment of the district court must be reversed, and the cause remanded to the court below, with directions to render judgment for the plaintiffs in error for their costs in that court.

SEARLE v. SAWYER.

SUPREME COURT, MASSACHUSETTS, 1879.

[127 Mass. 491.]

Morron, J. This is an action of tort for the conversion of a quantity of wood and timber.

It appeared at the trial that one Warren, being the owner of a lot of woodland, mortgaged it to the plaintiff's testator; and that, after the condition of the mortgage was broken, but before the mortgagee had taken possession, Warren cut the wood and timber in question and sold it to the defendant. The presiding justice of the Superior Court ruled that, "if the defendant bought of the mortgagor wood and timber cut from the mortgaged premises, and exercised such acts of ownership over the same as would amount to a conversion, then he would be liable to the mortgagee for the value of the same, without any previous demand, and although he bought the same in good faith and without any notice or knowledge of any claim upon the same." To this ruling the defendant excepted.

Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures, or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor; and that he has no property in wood or timber cut and removed, so as to enable him to maintain trover for its conversion. Peterson v. Clark, 15 Johns. 205; Cooper v. Davis, 15 Conn. 556. On the other hand, it has been held in Maine, New Hampshire, Vermont, and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, re-

mains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him. Gore v. Jenness, 19 Me., 53; Frothingham v. McKusick, 24 Me., 403; Smith v. Moore, 11 N. H. 55; Langdon v. Paul, 22 Vt. 205; Waterman v. Matteson, 4 R. I. 539.

We are not aware that this precise question has been adjudicated in this State, but the previous decisions of this court, in regard to the rights of mortgagees and the nature of their interest in the mortgaged estate, are such as to lead to the couclusion that a mortgagee out of possession is entitled to timber, fixtures, and other parts of the realty wrongfully severed, and may recover them, or their value, if a conversion is proved. In Fay v. Brewer, 3 Pick. 203, it was held that a mortgagee in possession, but before foreclosure, could maintain an action on the case in the nature of waste against a tenant for life, for cutting down trees on the mortgaged land before he took possession, and the court in the opinion comment on the case of Peterson v. Clark, 15 Johns. 205, as not being of authority here, "since the law of mortgage in New York is so different from our own."

In Page v. Robinson, 10 Cush. 99, it was held that a mortgagee, after condition broken, though not in actual possession, could maintain trespass against the mortgagor, or one acting under his authority, for cutting and carrying away timber-trees from the mortgaged premises, without license express or implied from the mortgagee.

In Cole v. Stewart, 11 Cush. 181, it was held that an action at law would lie by a mortgagee not in possession against one who, under authority from the mortgagor, removed a building from the mortgaged land.

In Butler v. Page, 7 Met. 40, a second mortgagee sold to the defendant a building standing on the mortgaged land, who took it down and removed the materials. It was held that the administrator of the mortgagor could not maintain trover for the materials, as the fee of the mortgaged premises was in the mortgagees, and the removal of the building vested no property in the materials in the mortgagor's representative.

In Wilmarth v. Bancroft, 10 Allen, 348, a house standing on mortgaged land was partially destroyed by fire. The mortgagor sold to the defendant such materials as were saved, and brought this action to recover the price agreed to be paid. It was held that the fact that the mortgagee had claimed the agreed price, and forbidden the defendant to pay it to the mortgagor, was a good defence. The opinion is put upon the ground that the partial burning of the house, and the consequent severance of the unburnt materials, "did not terminate or affect the mortgagee's interest in the fixtures."

So it has been held in several cases that a mortgagee out of possession may maintain an action at law against the mortgagor or a stranger for removing fixtures and thus impairing the security.

Gooding v. Shea, 103 Mass. 360; Byrom v. Chapin, 113 Mass. 308; King v. Bangs, 120 Mass. 514.

The fair result of these authorities is that, under our law, a mortgagee is so far the owner in fee of the mortgaged estate that, if any part of it is wrongfully severed and converted into personalty by the mortgagor, his interest is not devested, but he remains the owner of the personalty, and may follow it and recover it or its value of any one who has converted it to his own use. Stanley v. Gaylord, 1 Cush. 536; Riley v. Boston Water Power Co., 11 Cush. 11.

But the severance must be wrongful, and, where it is made by the mortgagor or one acting under his authority, whether it is wrongful or not will depend upon the question whether a license to do the act has been expressly given, or is fairly to be implied from the relations of the parties. The true rule is as stated in Smith v. Moore. 11 N. H. 55, and approved in Page v. Robinson, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed. The relation between a mortgagor and a mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this State the mortgage contains a provision that the mortgagor may retain possession until condition broken. The object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used; and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case, it is clear that he is entitled to take the annual crops, and wood for fuel. Woodward v. Pickett, 8 Gray, 617. And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case, that we are unable to say how far these considerations are applicable in the case at bar. But the ruling of the presiding justice seems to have been general, that the defendant would be liable if the wood and timber were cut from the mortgaged premises,

and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury. We are of opinion that this question should be submitted to the jury, and, therefore, that a new trial must be ordered.

Exceptions sustained.

JACKSON v. TURRELL.

SUPREME COURT, NEW JERSEY, 187

[39 N. J. L. 329.1]

In Case. On rule to show cause.

Dixon, J. Byard, being the owner of a plot of land in Paterson, mortgaged it, February 2, 1871, to the Washington Life Insurance Company, which forthwith duly recorded the mortgage. Afterwards, on February 6, 1872, he executed a second mortgage thereon to Benson, which was duly registered and then assigned to the plaintiff. Subsequently Byard placed a boiler and engine upon the premises. On October 1, 1872, he conveyed the property to the Paterson Silk Manufacturing Company, which, on January 16, 1873 executed to Miller a mortgage upon the realty, and a separate mortgage, securing the same debt, upon the boiler and engine as chattels. On June 26, 1874, Miller sold the boiler and engine, under his chattel mortgage, to the defendant, who immediately removed them from the premises.

The next objection which the defendant urges is, that as there was a prior unsatisfied mortgage upon the premises, the holder of which had not waived his right to recover of the defendant for the removal of the fixtures, the plaintiff being second mortgagee only, could not maintain an action. The ground upon which a mortgagee, not in possession, may support a suit at law against the mortgagor, or his alienee, for damages resulting from acts injurious to the mortgaged premises. has not been settled in the courts of this State, and the adjudications on that subject, outside of New Jersey, are not in accord, as will be perceived by a reference to the cases already cited. Sometimes the mortgagee has been deemed the legal owner of the fee as against the mortgagor and his assigns, and so entitled to hold them responsible for any act, beyond ordinary use, injurious to the land, to the full extent of that injury; and in Gooding v. Shea, 103 Mass. 360, a third mortgagee was regarded as standing in that position, and having the right to full damages, notwithstanding the fact that the prior mortgagees had superior rights to the same damages, unless the defendant could show that some of those prior mortgagees had appropriated the damages to

¹ This case is abridged. - ED.

themselves. See also Byrom v. Chapin, 113 Mass. 308, and King v. Bangs, 120 Mass. 514.

For so broad a claim on behalf of a first mortgagee, technical arguments, deserving of serious consideration, may perhaps be adduced; but, I think, no subsequent mortgagee can establish a like title. The reasons which support the claim of the first mortgagee defeat the claim of every other one, to be regarded as the legal owner of the fee. A second mortgagee is, in law, as in equity, a mere lien-holder, and in that character alone can he enforce any demand for redress.

In the case of Van Pelt v. McGraw, 4 Comst. 110, the right of mortgagees to maintain such suits is declared to rest upon the principle that the mortgage, as a security, has been impaired, and the damages, it is said, are to be limited to the amount of injury to the mortgage, however great the injury to the land may be. Upon this principle all mortgagees may stand, and it is recommended by the consideration that it gives to each party actually injured a remedy measured by the injury received. It obviates some technical objections, as well as some practical difficulties, which attend the rule first adverted to, and enables the courts of law to do justice by their equitable action on the case. Sometimes the facts disclosed at the trial may be of such a nature as to make it doubtful whether the damages should go to the plaintiff or to an earlier mortgagee; but, in those cases, the defendant is placed in no greater danger than is a defendant in an action upon a policy of insurance, brought by the owner, where the loss is made payable to the mortgagee, and the language of the court in such a case (Martin v. Franklin Fire Insurance Co., 9 Vroom, 140, 145,) indicates a mode in which all interests may be guarded: "The rights of the (earlier) mortgagee can be protected by payment of the money into court, and the insurer (defendant) may obtain indemnity against any subsequent suit by the (earlier) mortgagee, by the action of the court into which the money is paid; if actions be pending at the same time by the owner and the mortgagee (two mortgagees), the court, under its equitable powers, can so control the litigation that no injustice will be done."

It remains to inquire whether the proof admits of the inference that the plaintiff's security was impaired. At the time of the removal of the boiler and engine, the unpaid taxes on the property amounted to about \$2,000, and the first mortgage to nearly \$20,000. The evidence as to the value of the premises is meagre. At the sheriff's sale, in October, 1874, three months after the injury, no one would bid enough to cover the plaintiff's mortgage of \$8,000, and the plaintiff bought in the property. He says (and he alone testifies as to its value) that he then supposed it worth about \$25,000, and accordingly, on taking the title, he paid off the taxes and \$10,000 of the first mortgage. Under these circumstances, the justice at the circuit, before whom, without a jury, the cause was tried, had the right to find, as a fact, that both before and after the injury the premises were ample security for the first

mortgage, but insufficient to meet, also, the whole of the second mortgage, and that, consequently, the entire depreciation resulting from the defendant's acts, which he assessed at \$1,880, was so much stripped from the plaintiff's security.1

The rule to show cause should be discharged.

BURDEN v. KENNEDY.

[3 Atk. 739.]

Mel Chancellor. Where an execution by elegit or fieri facias is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown, and a leasehold estate is also affected from that time; and if the debtor subsequent to this makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment, to come at the leasehold estate, by setting aside the assignment. but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment.

But in the present case here is only an equity of redemption in the debtor in the leasehold estate, and an execution lodged will not affect this, as the legal estate is in the mortgagee; and consequently, by the common equity of this court, he may come here to redeem a subsequent encumbrancer, and likewise to discover whether there was any and what consideration for the assignment.

PROUT v. ROOT.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1875.

[116 Mass. 410.]

TORT against the sheriff of the county of Berkshire for the official misconduct of Horace S. Streeter, one of his deputies, in converting to his own use a span of horses, alleged to be the property of the plaintiff by virtue of a mortgage to him from one C. I. Ray. answer set up a special property in Streeter by virtue of an attachment upon a writ in an action in which Richard Prout was defendant. Trial in the Superior Court, before Allen, J., who allowed a bill of exceptions in substance as follows:

1 Gooding of Shea, 103 Mass and, contra; Straw v. Jenks, 6 Dak. 414, accord.—ED.

PROUT v. ROOT.

the co The plaintiff testified that he sold the horses to Ray on December 30. 1871, and took his promissory note therefor for \$330, payable on demand, with interest, and also a mortgage of the horses to secure the payment of said note; that on the day of the sale, Ray took possession of the horses, and they remained in his possession about five weeks, when the plaintiff demanded payment of the note of Ray, who declined to pay it, and thereupon the plaintiff demanded possession of the horses, and they were immediately surrendered to him by Ray: that the horses remained in his possession some three or four days. when they were attached by Streeter.

There was no evidence tending to prove that the plaintiff had ever given the notice of foreclosure as required by statute, or that Ray had ever offered to redeem the horses. The plaintiff put in other evidence tending to corroborate his testimony, and rested his case.

The defendant introduced evidence tending to prove that the horses were delivered up to the plaintiff by Ray, in satisfaction of the mortgage, and that the note and mortgage were fictitious, and intended to keep the horses from the reach of the plaintiff's creditors.

The defendant requested the judge to instruct the jury "that in no view of the case was the plaintiff entitled to recover, and that they must find a verdict for the defendant." The judge declined to so instruct the jury, but did instruct them, among other things not excepted to, that if the jury were satisfied from the evidence that the horses were delivered up to the plaintiff by Ray on the mortgage for the purpose of foreclosure, they were not liable to attachment upon the writ against the plaintiff while so held, and before foreclosure, and the jury must in that case find a verdict for the plaintiff. The verdict was for the plaintiff, and the defendant alleged exceptions.

COLT, J. A mortgage of personal property transfers the general property, and, in the absence of any agreement to the contrary, the The title is subject to a defeasance; immediate right of possession. but unless it has been devested by a performance of the condition, or by the exercise of the mortgagor's right to redeem, the mortgagee can alone maintain an action against a stranger for its conversion. It differs in this respect from a pledge, where only a special property passes and the general ownership remains in the pledgor. At law, and without statute intervention, the interest of the mortgagor is not liable to be taken on execution, because it is a mere equitable interest, and where there is no legal right there can be no legal remedy. Tucker, 1 Pick. 389, 399.

The precise question here presented is, whether the interest of a mortgagee of personal property in his possession, after breach of condition and before foreclosure, is liable to be so taken. We are referred to no case in which the point has been distinctly passed upon by this court. In the decision of it, regard must be had to existing legislation, and to the course of adjudication with reference to similar rights of property.

There is no substantial difference, at common law, in respect to the nature of the title between a mortgage of real and a mortgage of personal property. In both the title vests in the mortgagee subject to be defeated by the performance of the condition. In both, upon a breach of condition, the interest becomes absolute at law; and yet it was held in the case of Blanchard v. Colburn, 16 Mass. 345, that land mortgaged could not be levied on for the debt of the mortgagee unless he had first entered upon the same; for it was said, although to some extent the mortgagee is seised of the estate in fee simple, defeasible only by the performance of the condition or by redemption, yet within the meaning of the statutes which provide for the levy of executions, the land is treated as belonging to the mortgagor, liable to be taken in execution as his real estate subject to the mortgage. It was called a pledge for the security of a debt, which, if paid to the assignee of the debt, would discharge the mortgage and defeat any title acquired by the levy of a creditor of the mortgagee. These and other objections were declared insuperable. And again, in Eaton v. Whiting, 3 Pick. 484, and Marsh v. Austin, 1 Allen, 235, the mortgagee's interest was declared to be in fact but a chose in action, at least until entry to foreclose, and not liable to be levied on for his debts. All right of redeeming mortgaged lands had before these decisions long been subject to be taken on execution for the mortgagor's debt, and the mode of doing so pointed out by the statutes. St. 1783, c. 57, § 2.

The rule thus maintained as to mortgages of real estate applies with equal if not greater force to mortgages of personal property. general property technically passes, but it passes only as needed for the security intended. It is in the nature of a pledge. If it be for the payment of money, then it is treated but as an incident of the debt. An assignment of the mortgage carries the title to the property, and an assignment of the debt, without the mortgage, by operation of law, carries with it, in the absence of any controlling agreement or waiver of the right, an equitable lien on the property which attaches to it in the possession of the mortgagee, and all claiming title under him, with notice. Eastman v. Foster, 8 Met. 19; New Bedford Institution for Savings v. Fairhaven Bank, 9 Allen, 175. Upon payment or tender to the mortgagee of the debt secured, the title, without further formality, is revested in the mortgagor, and he may maintain replevin for it, or recover damages for its detention. Gen. Sts. c. 151, § 5. But what is more to the point, under our statutes, the mortgagor's interest in the property, so long as his right to redeem remains, is liable, as in the case of real estate, to be attached and taken on execution, as well after as before condition broken, and whether the property be in the possession of the mortgagee or not. Under such an attachment, the property passes into the custody of the sheriff, and there is only left to the mortgagee the right to redeem, after a demand, within a limited time, of the amount due on his mortgage. If this be paid the possession of the attaching officer cannot be interfered with, and the mortgagee's title is ended. Gen. Sts. c. 123, §§ 62-71. The rights thus given by statute are inconsistent with the existence of a similar right at the same time to attach the same property in favor of the creditors of the mortgagee. It is impossible that two officers should have equal right of possession by virtue of attachments against different parties in favor of different creditors.

The conclusion is, that under our laws, so long at least as the mortgagee's interest in personal property is held by him in good faith only as security, — before it has been, in fact, applied to the satisfaction of his debt by foreclosure or otherwise, — it cannot be attached as his property. Upon this bill of exceptions, it must be taken that the plaintiff's title as mortgagee was held in good faith, with no fraudulent purpose of defeating or delaying creditors. Upon this point we must presume that proper instructions were given, and the verdict is conclusive. Nor is there any question raised as to the true rule of damages to be applied in a case where the mortgagee's interest is applied to the payment of his own debt.

Exceptions overruled.

TRIMM v. MARSH.

COURT OF APPEALS, NEW YORK, 1874.

[54 N. Y. 599.]

This was an action for an accounting as to the amount due upon a bond and mortgage, and for the recovery of the mortgaged premises upon payment of the amount due.

EARL, C. The only legal proposition involved in this case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on an execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagee to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold upon execution against him? If this question be answered in the affirmative, the decision of the General Term was right and must be affirmed.

The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

These equitable principles have had an increasing influence upon courts of law, and Chancellor Kent says that "the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." 4 Kent Com. 158.

The common law rule, as modified by the equitable principles above alluded to, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default. nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England States, and in many of the other States of the Union. But this common law rule has never, to its full extent, been adopted in this State. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature. Waters v. Stewart, 1 Caines' Cases in Error, 47; Jackson v. Willard, 4 John. 42; Runyan v. Mersereau, 11 John. 534; Astor v. Hoyt, 5 Wend. 603; Packer v. Rochester and Syracuse Railroad Co., 17 N. Y. 283-295; Kortright v. Cady, 21 N. Y. 343; Power v. Lester, 23 N. Y. 527; Merritt v. Bartholick, 36 N. Y. 44.

Prior to the Revised Statutes the mortgagee could maintain ejectment to recover the mortgaged premises. This right has been taken away (2 R. S. 312), and now the mortgagor, both before and after default, is entitled to the possession of the premises, of which he cannot be deprived without his consent, except by foreclosure. It is not disputed that before possession taken by the mortgagee the mortgagor has an interest in the real estate which can be sold upon execution; that his widow is entitled to dower; that he can convey and devise his interest as real estate; that at his death it descends to his heirs; that he has every attribute and right of an absolute owner of the real estate, subject to the lien of the mortgage, and that his title can be defeated only by foreclosure. It is not disputed that the mortgagee before possession taken has only a chose in action; that he holds the mortgage only as security for the debt; that he can sell the bond and mortgage by mere delivery as personal property; that at his death they pass to his personal representatives as a portion of his personal estate; that he has no such estate in the land as can be sold on execution, or as

can give his widow dower; and that he has no attribute of ownership in the land. It was said by Judge James, in Power v. Lester (supra), that "a mortgage is a mere security, an encumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgage remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on an execution." Judge Pratt says, in Packer v. The Rochester & Syracuse Railroad Company (supra), that "a mortgagee has a mere chose in action, secured by a lien upon the land. Since the Revised Statutes there is no attribute left in the mortgagee, before foreclosure, upon which he can make any pretence for a claim of title. For the mere right, when he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title. He would have the same right in case of a pledge."

At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a reconveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such case a reconveyance was necessary; and such is still the rule in England and in many of the States of the Union. . But it has always been the law of this State that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as expounded by our courts. So that here the term "law day," which occupies such a prominent place in the early discussions as to mortgages, has no particular significance. The mortgagor has his "law day" until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this State to call the mortgagor's right in the land, before or after default, an equity of redemption; a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this State the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate.

But it is claimed by the learned counsel for the appellants that the position of the mortgagee is materially changed when he gets possession. It is true, notwithstanding the provision of the Revised Statutes which prohibits an action of ejectment by the mortgagee to obtain the possession of the mortgaged premises, that after he has lawfully obtained the possession he may retain it until the debt secured by the mortgage has been paid. Before taking possession the mortgagee has no title in the lands. How can the mere possession change the title from the mortgager to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged

for the security of his debt. After possession he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor's title would go to the heirs. Payment, or even tender, would destroy the mortgagee's right to retain possession, and would enable the mortgagor to maintain ejectment to recover possession. The mortgagee, in such case, so far from having any title, holds the land as the land of the mortgagor, and is liable to account to him for the rents and profits. Judge Comstock, in Kortright v. Cady (supra), says: "The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the land. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but where its object is accomplished it is neither just nor lawful for an instant longer."

I cannot doubt, therefore, that the mortgagor, after default, and after the mortgagee has taken possession, has such an estate in the land as can be sold upon execution. It is not necessary to decide whether, in such a case, the mortgagee has also such an estate in the land as can be sold upon execution, because, if he has, it does not follow that the mortgagor has not also such a right. They might each own an estate which could be sold. But I am of opinion that the mortgagee has no estate in the land which can be sold on execution. His interest is a mere chose in action, a debt secured by a pledge of real estate. His debt is not merged in the real estate by the possession. He has no interest in the real estate which he can sell, or which can be sold separate from the debt. Such a sale would convey nothing. Whoever took the real estate from him would take it subject to the same liability as he was under to account for the rents and profits to the mortgagor. It has been decided that a transfer of the mortgage without the debt is a mere nullity. Merritt v. Bartholick, supra.

The fact that, at the time of the execution sale, the defendants were in possession, claiming the absolute title, can make no difference, as land held adversely to the true owner can be sold upon execution against him. Tuttle v. Jackson, 6 Wend. 213; Truax v. Thorn, 2 Barb. 156.

I am, therefore, of the opinion that the title of the defendant under

the execution sale was valid, and that the plaintiff had no right to redeem.

The order of the General Term must be affirmed, and judgment absolute rendered against the plaintiffs, with costs.¹

EASTERN ELECTRIC CO. v. GREAT WESTERN CO.

SUPREME COURT, MASSACHUSETTS, 1895.

[164 Mass. 274.]

BILL IN EQUITY, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, § 1, to reach and apply, in payment of a debt due from the Great Western Manufacturing Company to the plaintiff, certain of its bonds in the possession of the American Loan and Trust Company,

Morton, J. The bonds in the possession of the Trust Company were the unissued obligations of the Manufacturing Company. The Trust Company had made no advances on them, and could not issue them except, as the bill stated, by the order of the Manufacturing Company. The unissued notes or bonds of a party in his possession and control do not constitute a part of his property or assets. Richardson v. Green, 133 U. S. 30, 47; Coddington v. Gilbert, 17 N. Y. 489. See also Barnes v. Mobile & Northwestern Railroad, 12 Hun, 126; Sickles v. Richardson, 23 Hun, 559; Cook, Stock & Stockholders (3d ed.), § 762; Jones, Corporate Bonds & Mortgages (2d ed.), § 181. And a party cannot be directly compelled to issue his notes or bonds for the purpose of borrowing money to pay his debts.

The plaintiff further contends that there are valuable rights which the Manufacturing Company has against the Trust Company which can be reached and applied, and which are, first, the right to any surplus that may remain after the mortgage is paid; secondly, the right to a release in case the bonds are paid in full by the Manufacturing Company; and thirdly, a possible right to require the return of the bonds which are in the hands of the trustee. There has been no foreclosure or default of the mortgage, there is no present surplus in the hands of the mortgagee to which the Manufacturing Company is entitled, the bonds have not been paid in full by it, and non constat that they will be, and no demand has been made for a release, or for a return of the bonds in the possession of the Trust Company.

We have been referred to no case in which it has been held that rights or demands so contingent and conjectural were property that

¹ The concurring opinion of Reynolds, C., and the dissenting opinion of Gray, C., are omitted. — Ep.

could be reached and applied in payment of debts due to a creditor. See Pettibone v. Toledo, Cincinnati, & St. Louis Railroad, 148 Mass. 411; Amy v. Manning, 149 Mass. 487.

Consideration of other questions raised and discussed in the briefs is rendered unnecessary by the result reached on the question whether the Manufacturing Company had any property in the possession of the Trust Company, and whether the alleged rights could be reached and applied in payment of the plaintiff's demand.

Decree affirmed.1

B. Incidental Tests of Ownership.

CHEATHAM v. JONES.

SUPREME COURT, NORTH CAROLINA, 1873.

[68 N. C. 153.]

Pearson, C. J. The question presented by the case is this: Has a mortgagor in possession a right to a homestead, as against all other creditors, save the creditors secured by the mortgage?

We concur in the opinion of his Honor, that the homestead is exempt from sale under execution, and that the mortgagor, although he holds subject to the mortgage debt, holds his homestead paramount to the other creditors.

A mortgage is a mere encumbrance upon a man's land, given as a security for the debts therein set out; and if he can discharge the encumbrance by the sale of the land outside of his homestead, or in any other way, creditors who are not secured by the mortgage, have no ground upon which to deprive him of the homestead secured by the Constitution.

We are of opinion that a debtor is entitled to a homestead in an "equity of redemption," subject to the mortgage debts, just as a purchaser in possession is entitled to a homestead, subject to the payment of the purchase-money.

No error.

PER CURIAM.

Judgment affirmed.

DOLLIVER v. ST. JOSEPH INSURANCE CO.

SUPREME COURT, MASSACHUSETTS, 1879.

[128 Mass. 351.]

Soule, J. The plaintiffs are the assignees in bankruptcy of Abraham Day, who, being the owner in fee of the buildings described in his policy, subject to certain mortgages and to a lease

1 Comparé: Warner v. Fourth Bk., 115 N. Y. 251. - Ed.

running for about three and one half years, obtained the policy sued on; and, the buildings having been destroyed by fire, bring this action to recover the amount for which they were insured. plaintiffs were appointed assignees after the loss. The defendant contended, and the chief justice at the trial ruled, that the action could not be maintained, because no mention is made in the policy of the encumbrances on the title to the property destroyed. ruling was based on the following provision of the policy: "4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownerhip of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." This provision is in the body of the policy, and is inserted for the benefit of the insurer. It is to be construed strictly against it, and liberally in behalf of the assured. If, therefore, its terms can be satisfied by a construction which will save the policy. and at the same time accord with the established rules of law, such construction must be adopted.

It has long been settled in this Commonwealth that, as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession. Willington v. Gale, 7 Mass. 138; Waltham Bank v. Waltham, 10 Met. 334; White v. Whitney, 3 Met. 81; Ewer v. Hobbs, 5 Met. 1; Henry's case, 4 Cush. 257; Howard v. Robinson, 5 Cush. 119; Buffum v. Bowditch Ins. Co., 10 Cush. 540; Farnsworth v. Boston, 126 Mass. 1. This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and, inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified or conditional fee, it might well be described as the entire and unconditional ownership; and, as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere encumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and the mortgagees. All the characteristics of such tenancies are lacking in their relations to the property.

The lease for years created only a chattel interest in the premises, not affecting the ownership of the fee. It was merely an encumbrance. It has been held by the Supreme Court of the United States, in a recent case, that an outstanding lease did not invalidate a policy in which the ownership of the assured was described as entire, uncondi-

tional, and sole. Insurance Co. v. Haven, 95 U. S. 242. And we do not understand that the ruling in the case at bar was supposed to rest on the existence of the lease.

The policy sued on provides, in the condition numbered 1, that "if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or on a sale under a deed of trust, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, . . . or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, the policy is void." It is evident from the first branch of this condition, that the parties did not intend that the placing of a mortgage on the insured property should be regarded as a change of title, or have any effect on the rights of the parties to the contract of insurance, but that the entry of a decree for foreclosure should avoid the policy, although such decree would not destroy the insurable interest of the mortgagor. The language of the second branch of the condition excludes the idea that a mortgagee or a lessee is to be regarded as in any sense an "owner" of the property, and the whole condition numbered 1 aids in arriving at the construction of the condition numbered 4, on which the defendant relies. Jackson v. Massachusetts Ins. Co., 23 Pick. 418. The plaintiffs' assignor owned the fee. was no adverse interest in the property, except that of the mortgagees The policy, in its terms, indicates that mortgaging and the lessee. the property is not intended to affect the policy, though a decree for foreclosing a mortgage shall avoid it. Furthermore the policy discriminates between owners and the holders of encumbrances, and nowhere contains any language which indicates that mortgagees or lessees are to be regarded, for any purposes of the policy, as owners of the property.

It is to be borne in mind, further, that the terms of the condition relied on by the defendant are not those which would naturally direct the attention of the insured to the question whether or not his estate is encumbered. If the defendant intended that the validity of the policy should be affected by the failure to mention existing encumbrances, that intention could easily have been made clear by inserting the word "unencumbered," or other phrase equivalent thereto, in the fourth condition of the policy, after the word "sole." It has already been held by this court that a requirement of the policy that the proof of loss should state the "whole value and ownership of the property insured," did not require any statement as to encumbrances, the property being under mortgage. Taylor v. Ætna Ins. Co., 120 Mass. 254. In Tennessee it has been held that the assured, who had bought the property and given the seller a lien for part of the purchase-money, was the unconditional and sole owner of it. hattan Ins. Co. v. Barker, 7 Heisk. 503.

This case does not require us to consider whether a subsequent

mortgage should be regarded as "a change of title" which would avoid a policy containing nothing to explain the sense in which those words were used. See Edmands v. Mutual Safety Ins. Co., 1 Allen, 311; Shepherd v. Union Ins. Co., 38 N. H. 232; Commercial Ins. Co. v. Spankneble, 52 Ill. 53; Hartford Ins. Co., v. Walsh, 54 Ill. 164.

On consideration, we are all of opinion that, on the peculiar language of the policy sued on, the ruling that the interest of the assured was not sufficiently expressed in the policy, and that the policy was therefore void, was erroneous. The case must therefore

Stand for trial.

STANCLIFT v. NORTON.

SUPREME COURT, KANSAS, 1873.

[11 Kans. 218.]

Action to foreclose a mortgage.

Brewer, J. Two questions were raised by counsel for plaintiff in error in their brief. The first grows out of these facts: The action is one for the foreclosure of a mortgage. The mortgagor failing to pay the taxes, the mortgagee paid them. The amount so paid was included in the judgment, and for it, as well as the principal debt, the premises were ordered sold. Was this error? The mortgage contains no other stipulation in reference to this matter than that upon a failure to pay the taxes when due, the entire mortgage debt should become due and the mortgagee at once entitled to recover. But the law in force at the date of the execution of this mortgage, and continuously up to the present time, authorized the mortgagee upon the failure of the mortgagor to pay the taxes, to pay them himself and have the amount included in any judgment rendered on the mortgage, and declared that the taxes so paid should be a lien upon the land. Gen. Stat., p. 1062, ch. 107, § 135. This mortgage contract was made with reference to the law then in force, and it was unnecessary to express it in a right which attached to all mortgages. It was by statute a condition of the contract as fully as though written in the body of the instrument. Probably too the mortgagee would have the right without the statute to pay the taxes and include them in the judgment, so as to keep his security perfect. There was therefore no error in this ruling of the

The other question arises on a demurrer to the defence stated in the answer. The time for which the note and mortgage were given had a

not expired when this action was brought. The only default alleged in the petition was a failure to pay the taxes when due, a sale for nonpayment, and a redemption therefrom by the mortgagee. Plaintiff claimed judgment and foreclosure for the full amount of the notes and the taxes. In their fourth defence the defendants alleged that since the filing of the petition herein, they had tendered to plaintiff the full amount of the taxes and penalty, and all costs accrued in the action, which tender was refused, and further that they now repeated the tender and brought the money into court. To this defence a demurrer was interposed and sustained. Was this error? We think not. the express terms of the contract the entire amount of the debt was to become due upon a failure of the mortgagor to pay the taxes. There is nothing to vitiate such a contract. It is not prohibited by statute, nor against public policy. Nor is it a hard contract, one which it would be unconscionable to enforce. The lender of money may well insist that the security be kept intact, or the loan mature. This is but parallel to the case of a stipulation that upon a failure to pay interest promptly the principal shall become due. Such stipulations have almost invariably been sustained. In one late case the opinion contains this language: "The entire amount cannot be altered by any construction which may be given to the contract. The time of payment only is contingent. The parties to the original contract have unquestionably a right to agree that if the interest upon the money is not paid punctually the principal shall become due. So they might make any other event the criterion of the time when the principal was to be paid." The case cited by counsel for plaintiff in error, 16 Ill. 400, has no application here. Whether the facts alleged in the second and third defences of the answer be true, we do not know. They are denied by the reply, and the record is silent as to the testimony. They must therefore be left entirely out of our consideration, and the case stands as the ordinary foreclosure of a mortgage with the default in the payment of taxes as the condition broken.

The judgment of the district court will be affirmed.

All the Justices concurring.

KEZER v. CLIFFORD.

SUPREME COURT, NEW HAMPSHIRE, 1879.

[59 N. H. 208.]

WRIT OF ENTRY, to foreclose a mortgage upon a tract of land in Wentworth. The defendant mortgaged the premises to the plaintiff by his deed dated September 26, 1870, containing the usual covenants

of warranty against all persons claiming under the defendant, to secure a note of the same date for \$1,500 payable on demand, with interest. Plea, the general issue, with a brief statement that the mortgaged premises were legally assessed to the defendant in the year 1874, by the assessors of Wentworth; that the defendant neglected and refused to pay the taxes; that because of the non-payment of the taxes the premises were duly advertised and sold May 20, 1875, to one John A. Davis; that the premises, not having been redeemed from the sale, were conveyed by the collector to Davis, May 22, 1876; that the defendant, February 12, 1875, filed his petition in the district court of the United States for the district of New Hampshire, and was adjudged bankrupt, and March 5, 1878, received a discharge from all his debts and claims provable in bankruptcy; that afterwards, to wit, September 12, 1878, he purchased of Davis his interest in the mortgaged premises, and on the same day received from him a quitclaim deed of the same; and that the defendant is in possession claiming title under his deed from Davis. The plaintiff moved to reject the brief statement, which was granted, and the defendant excepted. Trial by the court, and verdict for the plaintiff.

CLARK, J. The brief statement disclosed no defence, and was properly rejected. Pallet v. Sargent, 36 N. H. 496. Upon the facts proved, the defendant cannot set up the tax title to defeat the plaintiff's mortgage. The relation of mortgagor and mortgagee is such that a mortgagor in possession cannot acquire, as against the mortgagee, an indefeasible tax title of the mortgaged property. Cooley, Taxation, 345; Jones on Mort. § 680. The mortgage contained the usual covenants of warranty, and any tax title subsequently acquired by the mortgagor enured to the mortgagee. Gardiner v. Gerrish, 23 Me. 46; Fuller v. Hodgdon, 25 Me. 243. The mortgage debt was not paid, nor was the mortgage discharged by the discharge of the defendant in bankruptcy. Although he was thereby relieved from personal liability for the debt, and for damages for breach of his contracts generally, which could have been proved against his estate in bankruptcy, he was not freed from the estoppel of the mortgage covenants. Covenants are contracts, but they operate by way of estoppel as well as by way of contract; and the discharge of the bankrupt from personal liability for damages for breach of the contract does not release him ' from the estoppel which does not depend upon personal liability for damages. The debt is regarded as subsisting, so far as it is necessary to uphold the mortgage. The defendant cannot redeem the premises without paying the full amount of the mortgage debt, notwithstanding his discharge. Jones on Mort. § 1073. He is liable for any breach of the covenants in the mortgage arising subsequent to his discharge. Bennett v. Bartlett, 6 Cush. 225; French v. Morse, 2 Gray, 111; Reed v. Pierce, 36 Me. 455. And the tax title acquired by him passed to the plaintiff by way of estoppel, by force of the warranty, as if the discharge in bankruptcy had not been granted. Chamberlain v. Meeder, 16 N. H. 381; Bump on Bankruptcy, 8th ed., 743; Bush v. Person, 18 How. 82.

Judgment on the verdict.

SMITH, J., did not sit: the others concurred.

C. Administration of Estates.

COPE v. COPE. CHANCERY, 1707.

[2 Salkeld, 449.]

If a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favor of the heir, be applied to exonerate the mortgage. So it is, though there was no covenant, if the mortgagor had the money; because it was his debt, and he is bound to make it good though the land be a defective security; but if grandfather mortgages and covenants to pay, and the lands descend to his son, and his son dies, having a personal estate and a son, the son's personal estate shall not go in aid of this mortgage. A. mortgages his land to B., and after sells it to C. for £1,000, which includes the mortgage money; C. the purchaser shall pay the mortgage, for he has made it a debt in himself. But it is to be understood that this exoneration is not to be allowed, unless there, be personal assets sufficient to pay all legacies; for the mortgage shall be paid out of the land if there be not personal assets to pay the legacies; and if by such payment assets fall short, the legatees may make such mortgagee refund.

THORNBOROUGH v.

CHANCERY, 1675.

[3 Swanst. 628.]

LAWRENCE CLIFTON, in consideration of £500 conveyed to James Baker in fee; James, by a separate indenture, executed at the same time, agreed that if Lawrence paid £30 half-yearly during his life, and if the heirs of Lawrence after his death pay unto James Baker, his heirs, executors, administrators, or assigns, within six months after the death

of Lawrence, the full sum of £500, with the interest due since the payment of the last £15, then the conveyance to be void. Lawrence died, and the plaintiff's wife is daughter and heir. James Baker died in 1659, and by his death the forfeited premises descended to John Baker, an infant, his son and heir, who was defendant, by Sir John King, his guardian, together with his mother Sarah, the administratrix of James, since married to Nichols.

The plaintiff's suit was to have the redemption: the defendants, by answer, submitted to a redemption, and the administratrix confessed that James left assets to pay his debts, besides the £500 and interest; and the question before the Master of the Rolls was, whether the heir or administratrix should have this money? Wherein because the precedents were various, and this was like to be a leading case for the future, the Master of the Rolls would deliver no opinion, but left the cause to be set down before me to receive my determination upon it.

I decreed the money to the administratrix for these reasons:

First, where the condition of the fee-simple mortgage mentions neither heirs nor executors, there the money ought to be paid to the executors; for so is Littleton's text, and Goodal's case; and the reason is, because the money came first out of the personal estate, and so naturally returns thither again.

Secondly, when both are mentioned, but disjunctively, there if the mortgagee pay the money precisely at the day, he may elect to pay it to the heir or executor as he pleases.

Thirdly, where the precise day is past, and the mortgage forfeited, there all election is gone in law; for in law there is no redemption.

Fourthly, though equity do still give the mortgagee a power of redemption, yet equity will not revive the power of election which was once gone, because of the inconvenience; for if it should be revived to the mortgagor, he would delay payment as he pleased, and at last force a composition, and play the money into the hand which would use him best; and if the court should exercise that power, and take upon them to elect to whom they would give the money, it might be too arbitrary.

Fifthly, there ought so to be some certain rule; and the best rule is to come as near the rule and reason of the common law as may be: now the law always gives the money to the executor or administrator if no person be named; and when the election to pay either heir or executor is forfeited, it is all one in law as if neither heir nor executor had been named.

Sixthly, to inquire whether the executor or administrator have assets or not assets, is not the measure of justice in this case; it is a proper inquiry when the court will exercise an arbitrary disposition of the money, but otherwise it is not reasonable to hinder the mortgage money from returning to the personal estate, whence it came, only because the executor is thought to have enough already; for in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money; wherefore when this

security descends to the heir of the mortgagee, charged with an equity of redemption, as soon as the mortgagor pays the money, the land belongs to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executor or administrator.

Seventhly, although when the mortgagor covenants with the mortgagee, the case of the mortgagee's executors and administrators be so much the stronger for that personal covenant, yet without such a covenant the case is strong enough; and if the right of the money should depend upon these or the like circumstances, it might prove casus pro amico, which were not convenient.

Eighthly, it is not inconvenient nor absurd, that the heir who loses the land should also lose the money which comes in lieu of the land; for, as hath been said, the land is no more in equity but a security; and upon this ground it is that in London, mortgages in fee simple are always reckoned as part of the personal estate, and divided, according to custom.

SUPREME COURT, PENNSYLVANIA, 1855.

[24 Pa. St. 200.]

THE opinion of the court was delivered by

WOODWARD, J. Two other questions arising upon the will of John Hoff are presented by this appeal, quite unlike those which have just been ruled in the opinion in Newell's Appeal.

The testator devised to his wife, the appellant, for life, the house in which he dwelt on Chestnut Street, together with the policy of insurance and furniture. When he purchased the house in 1847, there was a mortgage resting on it for \$8,400, made by a former owner, and his will is silent in regard to the payment of the mortgage. The executors paid it off out of the personalty, and took an assignment; but the creditor and the Court of Common Pleas refused to allow them a credit for it on the ground that the widow took the estate cum onere, and that she must pay the mortgage. She appeals, and the question is whether the mortgage is chargeable on her estate or on the personalty.

The will contains, in the introductory clause, the usual direction as to payment of debts, a phrase which in England is necessary to charge debts on the realty, but wholly unnecessary here, where lands as well as personal estate are bound for every decedent's debts. Still the words "after the payment of my lawful debts," cannot be treated as meaning nothing; and if they are to have any significance, it must be that the executors should pay the debts before distribution be made of

the estate in pursuance of the will. A debt secured by a mortgage of the testator's own making, is no less a debt within the meaning of the introductory phraseology of wills than a promissory note; and executors are as much bound to pay the one as the other. The reason assigned in the English cases for throwing such a mortgage upon the personalty, is that the personal estate has been benefited by the making of the mortgage: a reason for which we stand in no need, though it is as applicable here as there. As to the mortgagee, the mortgage is a specific lien, and he cannot be restrained from resorting to the land pledged; and as between him and other creditors, he will often be compelled to do so in relief of other funds; but as between the mortgagor and his representatives, his mortgage is evidence of indebtedness; and where there is nothing in the will to control their action, it is their plain duty to pay it. And to excuse them there must be a clear declaration of intention that the devisee of the mortgaged premises is to take them cum onere. Thus it is settled, says Powell, on the authority of a great number of cases (see his work on Devises, vol. xi. p. 671), that a devise of mortgaged lands, subject to the mortgage thereon, does not throw the charge on the estate so as to exempt the funds which by law are antecedently liable, as the testator is considered to use the terms merely as descriptive of the encumbered situation of the property, and not for the purpose of subjecting his devisee to the burden.

But how is it where the estate comes to the devisor encumbered by a mortgage made by a former owner? If it come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate cum onere, and the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection, or contract, or communication with the mortgagee, and have done no act to show an intention to transfer the debt from the estate to himself. What dealings will have the effect to make the mortgage his own debt, have been debated in a great variety of cases, several of which counsel have cited in their paper-books. It seems that paying the mortgagee a higher rate of interest, and indemnifying the vendor against the mortgage, both which occurred in this case, are not such acts on the part of the purchaser as make him personally liable for the mortgage debt. Shafto v. Shafto, 2 Cox's P. W. 664; Woods v. Huntingford, 3 Ves. 128.

The court below ruled the question on this ground. The learned judge said, it must appear that he (the testator) has done some act by which he has made himself directly liable to the owner of the encumbrance; and then he ruled that the evidence submitted to the auditor was insufficient to shift the obligation from the real to the personal fund. We agree that some act must be shown, indicative of an intention to take the mortgage upon himself, and the court were, perhaps, right in setting aside the evidence of payment of an increased rate of interest, and certainly right in disregarding the declarations of the

testator, made to persons having no interest in the subject; but they overlooked one important and decisive fact, which was in full proof before the auditor, to wit, that Hoff purchased not merely the equity of redemption in this house and lot, but the entire interest, and that the mortgage formed part of the price of the estate. The proof was that he bought of William Reynolds and wife for \$13,900; that he paid \$5,500, which, with this mortgage of Elmes to Harvey for \$8,400, was "in full the consideration for the premises." The receipt of Reynolds, indorsed on his deed to Hoff, stipulates, moreover, that the said mortgage and the interest due, and to grow due, thereon are to be paid by the said John Hoff.

Now, it is immaterial whether this amounted to a covenant on the part of Hoff to pay the mortgage, though, according to the doctrine of Campbell v. Shrum, 3 Watts, 60, and the cases there cited, it might be easy to say it did, but surely there can be no doubt he would be liable to an action for money had and received, at the suit of the mortgagee. As was said in the case of the Earl of Belvidere v. Rochfort, cited in 2 Powell on Devises, 679, the plain intent of the deed was to put the purchaser in the place of the vendor, and that he might not be longer liable to the mortgagee, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he himself had covenanted to pay it off, and either the vendor or mortgagee might, upon contract, have compelled him to pay it off. The decree in that case was confirmed by the House of Lords, and though some doubt has been thrown upon it by Lord Thurlow, in Tweedle v. Tweedle, 2 B. C. C. 107, and by Lord Alvanley, in Woods v. Huntingford; still, its good sense is its sufficient vindication, and commends it to our acceptance. Nor is the doctrine of that case destitute of support from authorities of high respectability, as may be seen by consulting Billinghurst v. Walker, 2 B. C. C. 608; Cope v. Cope, 2 Salk. 449, 2 Ch. Ca. 5; Pochley v. Pochley, 1 Vern. 36; King v. King, 3 P. W. 360; Galton v. Hancock, 2 Atk. 436; Robinson v. Gee, 1 Ves. 251; Phillips v. Phillips, 2 Bro. C. 273; Johnson v. Milkrop, 2 Vern. 112; Balsh v. Hvam. 3 P. W. 455.

If then Hoff, in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remained unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase-money enough in his hands

to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in assumpsit if not in covenant; but, not being paid in the lifetime of Hoff, his personal estate had the benefit of it, and it went into the hands of his executors for the payment, first of all, of his "lawful debts." He had no debt more lawful than this mortgage, and there is great precision in the equitable principle which devotes that money in the executor's hands to the satisfaction of this debt.

But that principle is applicable only when there is no controlling testamentary intention expressed. If it were deducible from the whole will, that the testator meant his widow should pay the mortgage out of her life estate, we should be obliged to say so—for the will is the law of his estate. But no such intention is manifest.

It is clear, however, beyond all doubt, that he meant the bulk of his personal estate should go to legatees in the form of pecuniary legacies; and it seems to be settled that the devisee of a mortgaged estate is not entitled to be exonerated out of personal estate specifically bequeathed. O'Neal v. Mead, 1 P. W. 693. And the same rule, it has been decided, extends to pecuniary legacies. Lutkins v. Lee, Cases in Time of Talbot, 3; Hamilton v. Morely, 2 Ves. Jr. 65. In Ruston v. Ruston, 2 D. 243, s. c. 2 Y. 54, we have a discussion of many of the principles I have adverted to; and, under a devise of mortgaged premises, it was held that the personal estate of the testator shall not go in ease of the mortgaged premises, so far as to defeat specific or ascertained pecuniary legacies, or any part thereof; — aliter of the legacies of the residuum.

On this ground the decree of the court can be sustained so far as the ascertained legacies under the will are concerned, but not as to the residuum, and the auditor's report shows that there will be a residuum, though not of sufficient amount to pay off the mortgage. Whatever there is must be applied to the mortgage in ease of the widow's life estate. The auditor distributed this under the 13th clause of the will; but so much of the decree as sustains this distribution must be reversed. If that clause be regarded as a bequest of additional legacies, it is so general and indefinite in terms as not to exempt the portion of the estate to which it applies from contribution to the mortgage.

The only remaining question on this appeal relates to the bequest to the widow of the "interest on \$15,000 of such stock as I may possess." We do not regard this as a specific legacy of that much of the testator's stock; but in allowing her, as the auditor did, the full interest on \$15,000 of the testator's Pennsylvania six per cents at par value, we believe he came as near to the mind of the testator as was possible. If it be objected that it is liable to taxation, the widow must bear it. We see nothing in the will that would compel anybody else to pay her taxes.

PLIMPTON v. FULLER.

Supreme Judicial Court, Massachusetts, 1865.

[11 Allen, 139.]

BILL IN EQUITY in the nature of a bill of interpleader, by the executors of the will of Francis W. Fuller, setting forth a copy of the testator's will, which contained the following devise:

"I give, bequeath and devise to my father, Warren Fuller, and to my mother, Eliza B. Fuller, their heirs and assigns, all the right, title, and interest which I own in the homestead now occupied by my said father, Warren Fuller, excepting that my aunts, Eliza Fuller and Hannah Fuller, are to have free and undisturbed possession of the old house, with all the privileges they have heretofore had, except that of cutting off wood."

The will also contained various devises and legacies of money, and gave the residue of the personal estate to his wife, "after the payment of all my just debts, legacies and charges against my estate." The bill further set forth that the land described in the devise above quoted was subject to a mortgage by the testator to secure his promissory note for \$1,666.67, with interest payable semi-annually; that the testator paid the interest on this debt as it became due, up to the time of his death, in January, 1864; that since his death no interest had been paid; that the legacies of money amounted to \$4,300, and the assets, exclusive of specific devises and bequests, to about \$5,541; and praying that the several defendants, who were the widow and legatees of the testator, might be decreed to interplead, and that it might be determined by whom the mortgage debt should be paid. These facts were all admitted by the several parties who appeared as defendants.

The general rule of law, in the absence of any expressed intent, is that debts contracted by the testator, elthough secured by mortgage, are to be paid out of his personal property to the exoperafion of his real estate. Seaver v. Lewis, 14 Mass. 83; Hewes v. Dehon. 3 Grav. 205. In this case, the expressed intent accords with the general rule. The gift of the personal property to the widow is in terms postponed to the payment of all debts, legacies, and charges against the estate. In the devise of the homestead to the father, the use of the words restricting it to the testator's right, title and interest is accounted for by the outstanding right of dower in his mother, if not by a life estate in his aunts. The direction to sell other real estate has no tendency to charge this. The manifest intention of the testator was to devise to his father the homestead which had once been his, subject only to his wife's right of dower, and to the possession for life of the testator's maiden aunts. The personal property is therefore to be applied to the discharge of the mortgage. Decree accordingly.

D. Questions of Dower.

NASH v. PRESTON.

King's Bench, 1631.

[3 Cro. Cas. 190.]

A BILL IN CHANCERY was referred to Jones, Justice, and myself, to consider whether one should be relieved against dower demanded, &c.

The case appeared to be, that J. S. being seised in fee, by indenture enrolled, bargains and sells to the husband for one hundred and twenty pounds, in consideration that he shall re-demise it to him and his wife for their lives, rendering a peppercorn; and with a condition, that if he paid the hundred and twenty pounds at the end of twenty years, the bargain and sale shall be void. He re-demiseth it accordingly, and dies: his wife brings dower.

The question was, whether the plaintiff shall be relieved against this title of dower?

We conceived it to be against equity, and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it re-demised immediately to them, as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if a husband take a fine sur cognisance de droit come ceo, and render arrear, although it was once the husband's, yet his wife shall not have dower; for it is in him and out of him quasi uno flatu, and by one and the same act. Yet in this case we conceived, that by the law she is to have dower: for, by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have dower; and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower; for it is against the rule of law, viz., "where no fraud or covin is, a court of equity will not relieve." And upon conference with other the Justices at Serjeants-Inn upon this question, who were of the same judgment, we certified our opinion to the court of chancery, that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof.

MILLER v. THE FARMERS' BANK.

SUPREME COURT, SOUTH CAROLINA, 1897.

[49 S. C. 427.]

Action by Fannie E. Miller against the Farmers' Bank of Edgefield in the Probate Court for dower. Judgment for plaintiff. Defendant appeals.

MR. JUSTICE GARY (after stating the facts):

The 4th and 5th exceptions will be considered together, and are as follows: "4th, Because his Honor, the Circuit Judge, erred in holding as applicable to this case, 'that where there is a foreclosure and sale of mortgaged premises upon a mortgage valid against the wife, the result is to devest her of all claim upon the land, and compel her to look to the surplus proceeds of the sale, if any remain, after satisfying the mortgage debt; and if there is no surplus proceeds of sale, after satisfying the mortgage debt, the widow's dower is gone.' 5th. Because his Honor, the Circuit Judge, erred in holding as erroneous the judgment of the probate judge that the renunciation of dower by the plaintiff on the D. E. Lanham or third mortgage, was for the benefit of that mortgage alone, and only postponed the satisfaction of that mortgage."

From the decisions rendered by the court of last resort in this State, the following principles are deduced: 1st. If, at the time of coverture, there are encumbrances on the land, and there is a judicial sale of the land during coverture to satisfy such encumbrances, the wife is regarded as in privity of the estate with her husband, and whatever rights she may have are transferred to the surplus proceeds of sale after payment of the encumbrances; but she has no right to have dower set off to her in the land thus sold.

2d. If, at the time of, or during coverture, the title of the husband is complete and unencumbered, and he afterwards mortgages the land, the wife is not a privy in estate with her husband, and her right to claim dower in the land is paramount to that of the mortgagee. In such case her rights are not transferred to the surplus proceeds of sale

if the mortgage is foreclosed during the lifetime of her husband, but, after his death, she can have dower assigned her in the land itself.

3d. If the title of the husband is complete, and, during coverture. he executes a mortgage on the land upon which the wife renounces her dower, and the mortgage is foreclosed during coverture, she, by her own act, did that which as effectually deprives her of the right to claim dower in the land, as if the mortgage had been executed for the purchase-money of the land, or had been a subsisting lien at the time of marriage. In all these cases the rights of the purchaser are paramount to the wife's claim of dower. When the wife renounces dower in the land she, by her own act, places herself in privity of estate with her husband.

4th. In cases where the rights of the wife are in privity with those of her husband in the land, and the land is sold under a judgment of foreclosure during coverture, the wife is not a necessary party to foreclosure proceedings, and after the death of her husband, has no right to claim dower in the land.

5th. When a wife renounces dower on one mortgage, and there are other mortgages, as in this case, under all of which the land is sold during coverture, the wife, after the death of her husband, is not entitled to relief against the purchaser of the land on the ground that the renunciation of dower was for the benefit alone of that mortgage upon which the dower was renounced, and only postponed the satisfaction of that mortgage. The purchaser must be regarded as succeeding to all rights of the parties to the action and of the wife, who cannot dispute his title. This court is fully satisfied, by the reasoning of the Circuit Judge and the authorities cited in his decree, that the land was sold under all the mortgages aforesaid. The 4th and 5th exceptions are also overruled.

The 8th exception is too general for consideration.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

SUPREME COURT, MAINE, 1852.

[34 Me. 50]

BILL IN EQUITY to redeem real estate mortgaged.

The plaintiff is the widow of John Simonton, who died in 1851, and who, in 1844, mortgaged the land, by a deed in which the plaintiff relinquished her right of dower. In 1847 the land was sold for taxes to one Lord, who afterwards conveyed his title to the mortgagee.

Through several conveyances, the defendant became the assignee under the mortgagee and also the assignee under the mortgagor.

In July, 1849, the original mortgagee took measures to foreclose by publishing in a newspaper and recording the same as the statute prescribes. The plaintiff, within the three years, and before the filing of this bill, demanded of the defendant an account, &c., which he neglected to render.

Note. If the widow is entitled to redeem, the parties requested the court to give instructions, as to the principles which should govern the master in deciding what amount in gross, or what amount annually, ought to be paid to her for a release of the estate.

Howard, J. An equity of redemption is an estate in the land, which may be devised, or taken on execution, and which may descend to heirs. It is subject to dower. Rev. Stat. ch. 95, § 15.

If the purchaser of an equity of redemption take an assignment of the mortgage, both estates may stand, though united in the same person. When substantial justice may be promoted, the mortgage will be upheld, or not, according to his intention or his interest. For mergers are not favored in courts of law or in courts of equity. Campbe'l v. Knights, 24 Me. 32; Holden v. Pike, 24 Me. 427; Gibson v. Crehore, 3 Pick. 475; Eaton v. Simonds, 14 Pick. 98; Forbes v. Moffatt, 18 Ves. 390; Lord Compton v. Oxenden, 2 Ves. 264; James v. Morey, 2 Cow. 294, opinion of Sutherland, J.

In the case at bar, it is for the interest of the purchaser of the equity of redemption, and of those claiming under him, that the mortgage should be upheld against the encumbrance of dower. It would not comport with just principles of law or equity, that, after uniting with her husband, and releasing her right, the plaintiff should have dower in that estate. But she is entitled to dower in the equity of redemption, to which her release, and the subsequent conveyance by her husband, present no bar; and she can, therefore, redeem the estate.

According to the agreement of the parties a master will be appointed to ascertain the value of her estate in gross, and the annual value. As she must keep down one third of the interest on the amount due upon the mortgage, the yearly value of her estate will be found by deducting from one third of the net annual income of the whole estate, one third of the annual interest on the amount of the mortgage debt due.

The master will ascertain the value of the net, annual income of the whole estate; the amount due upon the mortgage at the date of the demand of dower, and the probable duration of the life of the complainant. From these elements the required results may be readily determined. The sum to be paid to her, for the release of her estate,

will be the present worth of an annuity during her life, equal to the net annual value of such estate. Carll v. Butman, 7 Me. 102; Russell v. Austin, 1 Paige, 192; House v. House, 10 Paige, 158; Bell v. Mayor of New York, 10 Paige, 62.

All further orders and decrees are suspended, until the coming in of the master's report.

W

HURST v. DULANEY.

SUPREME COURT OF APPEALS, VIRGINIA, 1891.

[87 Va. 444.]

APPEAL from decree of the Circuit Court of Northumberland County, rendered April 1, 1889, in a cause wherein the appellant, Athalia Hurst, widow of James Hurst, deceased, was complainant, and R. H. Dulaney was defendant. Opinion states the case.

LEWIS, P., delivered the opinion of the court.

The principal question in the case is whether the appellant, who is the widow of James Hurst, deceased, is entitled to dower in the tract of land, known as "Bluff Point," in the bill and proceedings mentioned. The facts are these:

On the 1st day of January, 1861, the land was sold and conveyed by James L. Haynie to Hurst, who, on the same day, executed a deed of trust thereon to secure the unpaid purchase-money to William H. Haynie, the assignee of the vendor. In 1872 Hurst was adjudged a bankrupt, and in the course of the bankruptcy proceedings the land was sold at public auction to the said William H. Haynie. The substituted trustee in the deed of trust united in this sale, and also united with assignees in bankruptcy in conveying the land to the purchaser. This was in 1873, and in the lifetime of Hurst. The land brought \$450 in excess of the debt secured by the deed of trust, which was paid by the purchaser to the assignees in bankruptcy. The sale was duly reported to the bankrupt court, and confirmed. In 1875 Haynie, the purchaser, and others, who claimed an interest in the fund, conveyed the land to Dulaney, the defendant below, who remained in undisturbed possession thereof until the commencement of this suit, about twelve years afterwards, Hurst in the meantime having died.

From this statement it is very clear, as the Circuit Court held, that the claim to dower in the land cannot be sustained. The deed of January 1, 1861, from Haynie to Hurst, and the deed of trust executed on the same day, are considered in equity, not as separate and

distinct transactions, but as part of the same contract; so that the seisin of the husband was for a transitory instant only, and of such a seisin, according to an ancient principle of the common law, the wife is not entitled to dower. This principle has so often been recognized by this court, that it would be a waste of time to do more than merely cite the cases, and they are Gilliam v. Moore, 4 Leigh, 30; Wheatley's Heirs v. Calhoun, 12 Leigh, 264; Wilson v. Davisson, 2 Rob. 384; Robinson v. Shacklett, 29 Gratt. 99; Summers v. Darne, 31 Gratt. 791; Coffman v. Coffman, 79 Va. 504.

These cases also establish the proposition that if both instruments are executed on the same day, the presumption is they were executed at the same time, and are parts of the same transaction, unless the contrary be shown, — unless it be proved that they were separate and independent acts.

Nor is the present case affected by the fact that the deed of trust was for the benefit of an assignee. The deed was given to secure the unpaid purchase-money for the land, and that is sufficient. The principle above stated has often been held to apply in favor of a third person who advances the purchase-money, and at the time of the conveyance takes a mortgage on the land for his indemnity, and it equally applies to a case like the present. Cowardin v. Anderson, 78 Va. 88.

Thus far, then, the decree appealed from is right. But the court went on to decree, not only that the appellant is entitled to dower in the surplus arising from the sale of the land, but that the defendant is liable accordingly; that is, that he must pay to the appellant the sum of nine dollars per annum during her natural life, which is the annual interest at six per cent on one third of the surplus. This was erroneous. The statute, now carried into section 2269 of the code, although it provides that the widow in such a case shall be entitled to dower in the surplus, does not make the land, in the hands of a bona fide purchaser at a judicial sale thereof, liable for her claim, nor is he bound to see to the application of the purchase-money. In other words, she must look to the surplus, and not to the purchaser who has paid it. Robinson v. Shacklett, supra.

The decree must, therefore, be reversed, and the bill dismissed.

Decree reversed and bill dismissed.

SECTION II. - REDEMPTION.

A. Limitations upon Redemption.

HOWARD v. HARRIS.

CHANCERY, 1681.

[1 Vern.: 33.]

Howard mortgages land, and the proviso for redemption was thus: provided that I myself, or the heirs males of my body, may redeem. The question was, whether his assignee should redeem it? and it was decreed, he should; for, if once a mortgage always a mortgage.

In this case part of the mortgaged estate happened to be in Mrs. Howard's jointure, and it was admitted that she thereby was entitled to a redemption of the whole mortgage; and so it was adjudged in the case of Browne and Edwards.

BATTY v. SNOOK.

SUPREME COURT, MICHIGAN, 1858.

[5 Mich. 231.]

Manning, J. The bill in this case is very inartificially drawn; so much so, that, on first reading it over, one is at a loss to know whether it is for the redemption of mortgaged premises, for the specific performance of a contract, or to set aside certain transactions for fraud. We mention this, as the merits of a case may sometimes be overlooked, or lost sight of, by reason of the rubbish under which it is concealed. We think, however, there are sufficient facts stated, when separated from the irrelevant or immaterial matter, to enable us to treat it as a bill to have a certain deed and contract relative to real estate declared a mortgage, and for redemption of the mortgaged premises. As such we shall consider it.

Complainant purchased of the defendant Warner, in 1853, a lot in the village of Mt. Clemens, on which there was a sawmill. On the 5th of April, 1854, the premises were deeded by Warner to complainant, who, at the same time, to secure a part of the purchase-money, mortgaged the lot to Warner for \$2,331.26, payable with interest—\$500 on the 18th of November, 1854; \$500 in one year thereafter; the like sum in two years; and the balance, being \$831.26, in three

years. The complainant soon thereafter, and in less than a year, became embarrassed in his business, and was unable to pay Warner and his other creditors what he was owing them. He was indebted to Warner in a large sum, over and above the mortgage debt, and Warner, being aware of his pecuniary difficulties, was solicitous to get his debt secured - that is, that portion of it not included in the mortgage; and went twice from Saginaw, where he was residing, to Mt. Clemens, to see if he could not make some arrangement with complainant for that purpose. On his last visit a settlement took place between the parties. from which it appears complainant turned out property in part payment of what he was owing him, leaving a balance still due Warner of \$2,000. Warner, to effect the settlement, was induced to take the property at more than its value. In pursuance of this settlement, the mortgage from complainant to Warner was cancelled, and the mortgaged premises were deeded back to Warner by complainant. This deed bears date on the 6th February, 1855.

There is also a contract between the parties for the repurchase of the premises by complainant. This contract bears date February 7the day after the deed. Were the two instruments part of one and the same transaction? or were they separate and distinct transactions? The difference in their dates favors the latter view, but it is by no means conclusive. The bill alleges both had their origin in the settlement, and that they are parts of the same transaction, and were intended as security for the payment of the \$2,000. The answer, instead of denving this in clear and explicit terms, as it should have done if it was not the truth, we think admits it. Referring to Warner's second visit, the answer says, he (Warner) was about to return home when complainant stated to him he had a horse and buggy and a certain promissory note he would let him have, if "he would release all complainant was owing him aside from the mortgage, and a part of the latter, and extend the payment due on the mortgage to the 1st of December, 1855." The answer then proceeds: "That this defendant, thinking he could do no better, then and there agreed to take said note and horse and buggy, and a deed of said sawmill lot and mill, and entered into contract A." (the contract of 7th February, 1855, already spoken of), "with the design and express understanding on the part of said complainant and this defendant, if he (the said complainant) failed in any particular in complying with said contract A., that he (the said complainant) should have no right at law or in equity to the said lands and sawmill; and said contract A. was particularly and expressly conditioned to be the same as an original contract for the conveyance of land, in which time should be material, and every requisite on the part of said complainant to be done and performed, should be by him literally complied with."

Here is an admission of complainant's case by the answer. It admits the deed and contract are parts of one transaction, and that the object of them was to secure the balance of complainant's debt to Warner. It also shows that if complainant failed to pay promptly when the debt became due, he was to forfeit all right at law and in equity to the premises he had conveyed to Warner, and that to effect this object, it was agreed the contract should be considered and treated as an original contract for the purchase of the premises, in which time should be material. When the arrangement was entered into there was but one payment due on complainant's mortgage of the 5th April, 1854, and one other that would become due before the 1st December, 1855, when complainant was required to pay \$500 on the contract of 7th February, which also provided for the payment of the remaining \$1,500 in one year thereafter — nearly a year before the last instalment would have fallen due on the mortgage given in 1854. The contract contained a covenant for the payment of the \$2,000, and by it complainant was to retain possession of the premises, and was not to remove any buildings or machinery.

Other facts might be mentioned, to show the mortgage of '54 was cancelled, and the deed and contract of the 6th and 7th February, '55, were made to secure the \$2,000 complainant was owing Warner; but it is unnecessary to notice them, or go into the proofs to establish what is admitted by the answer.

The only remaining question is, whether the case is one proper for the interposition of a court of equity.

Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee, by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor. But it cannot be done by a contemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures. What we now call a mortgage was at common law a conditional conveyance of the land, by which the title of the vendee was to terminate or become absolute on the performance or non-performance of the condition of the grant by the vendor at the day. When such conveyance was made to secure a debt, or for the performance of some other act by the vendor, equity took cognizance of the transaction, and declared the conveyance a security merely for the payment of the debt, or doing of the act, and on the performance thereof by the vendor, after the day had elapsed, and the estate had become absolute, would decree a re-conveyance of the premises. To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract, would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object.

Snooks, the other defendant, to whom Warner conveyed on the 22d

December, 1855, purchased with full knowledge of complainant's equities. He took possession soon after, and has been in possession ever since.

The decree of the court below, dismissing the complainant's bill with costs, must be reversed, and a decree be entered declaring the deed and contract one transaction, and to be a mortgage, and that complainant is entitled to redeem; and the transcript must be remitted to the court below for further proceedings.

The other Justices concurred.1

HART v. BURTON

COURT OF APPEALS, KENTUCKY, 1832.

[7 J. J. Marsh. 322.]

CHIEF JUSTICE ROBERTSON delivered the opinion of the court.

This is an action of covenant brought by Charles Hart against Charles F. Burton, on the following writing: "Borrowed from Charles Hart Senr. \$275, for which I have placed in his hands as security, a negro girl: should I not pay said sum of money by the 20th inst. the said girl is to be the absolute property of said Hart, and I bind myself to give a bill of sale when demanded.

(Signed) C. F. Burton."

"Feb. 9, 1827."

The declaration averred that the slave had died in April, 1827, without the plaintiff's fault, and charged, as a breach of the covenant, the non-payment of the \$275 on the 20th of February, 1827, or since.

The Circuit Court, being of opinion that covenant could not be maintained, sustained a demurrer to the declaration, and thereupon gave judgment in bar of the action.

In revising the judgment, two questions are presented for consideration: 1st. Does the writing import a conditional sale, or only a pawn or mortgage? 2d. If the legal effect of the contract be only a security for the repayment of money loaned, is there any covenant to pay the money on the 20th of February, 1827? These are legal propositions, and therefore must be decided at law, as they should be in equity, according to the actual import of the writing, when tested by the fixed rules of law and reason.

I. We cannot construe the writing to be legal evidence of a conditional sale. The parties, and especially the plaintiff, may have in-

¹ Compare: Pamer v. Pamer, 74 Ala. 285; Pritchard v. Elton, 38 Conn. 431; Tennery v. Nicholson, 87 Ill. 464; Youle v. Edwards, 1 N. J. Eq. 534; Clark v. Henry, 2 Cow. 324; Stover v. Bounds, 1 Oh. St. 107.—Ep.

tended that the contract should become a sale on the non-payment of the \$275 within the eleven days allowed for the reimbursement of the loan. But as the writing states the consideration to be a loan of money, and shows expressly, that the slave was delivered to the lender, as a collateral security, the contract, according to legal intendment, is a pawn or mortgage. It was certainly so at, and immediately succeeding, its completion; and the maxim, "Once a mortgage always a mortgage," is as legal as it is equitable, and applies to all collateral securities, as well to mere pledges as to technical mortgages. See Edrington v. Harper, 3 J. J. Marshall's Reports, 353, and Brown v. Bemont et al., 8 Johnson, 75.

It is not material whether this be a mortgage or a pawn. The right of redemption attaches equally to both, and it is as difficult to transmute the one as the other into a sale, by the operation of the original contract. Though anciently at Rome, the creditor and debtor were permitted by the lex commissoria, to make an agreement at the date of the pledge whereby it would, on a prescribed contingency, become the absolute property of the pawnee; such a power was not indulged, even at Rome, since the days of Constantine, who abolished the law by which it had been sanctioned. Every agreement for preventing redemption of pawns is proscribed by the common law as emphatically as are similar agreements in mortgages of real estate. Wherefore, whether the contract in this case be deemed a pledge or a mortgage, the same rules of law apply to it, and produce the same effect. The same contract which made the slave a pledge for money borrowed, did not, proprio vigore, make her the absolute property of the pawnee or mortgagee. If it were ab origine, a pledge or mortgage, it continued to be so; and whatever may have been the actual intentions of the parties, the deduction of law from the fact of loan and of security is that the contract was not a sale, but a pledge or mortgage only.

Burton might surely have redeemed, even after the eleven days; and as he had the right to redeem, Hart had correspondent rights, and may maintain a suit for his money without attempting a foreclosure. We cannot admit that, if one party had a right to treat the contract as a mortgage, the other shall not have a similar right; their rights must be equal and reciprocal. The contract is a mortgage or not a mortgage as to both parties. If the contract be considered a mortgage, the death of the slave did not affect the mortgagee's right to sue for the money loaned. If it be a pledge only, the death did not affect any legal right which otherwise he may have had to sue for the amount loaned, unless the death resulted from his culpable negligence, or was occasioned by his improper conduct; and the declaration negatives any such delinquency.

II. The writing imports a covenant to pay the \$275 on the 20th of February, 1827. As the contract was not, according to its legal operation, a sale, a contract to refund the money must be presumed;

and we are of opinion that such a contract is expressed by the writing itself, when properly construed. There is no covenant, in totidem verbis, to pay \$275 on the 20th of February, 1827, or at any other time. But the words, when sensibly and practically interpreted, clearly import a covenant to pay the money which was loaned. And as language expresses that which is rightly understood by it, therefore, if the writing in this case, when properly understood, means that the money was to be refunded, that is, of course, an express covenant to that effect.

Any words which, literally or constructively, evince an agreement, will amount to an agreement, and will, of course, be an express covenant when inserted in a specialty. Hence a recital (in a deed) of an agreement will amount to an express covenant, because it is an acknowledgment, by deed, of the existence of such agreement. So too, a similar acknowledgment of a sale of land would be deemed an express covenant to convey the legal title, because the act of selling carries with it, as a natural and usual consequence, an obligation to make a title. The principle is plain and its application is easy; we shall, therefore, not exemplify further. See Wheaton's Selwyn, 343-4; Bac. Ab., Covt. B; Beal's Adr. v. Schoal's Exr., 1 Marshall, 476.

"Borrowed" imports necessarily an obligation to return the thing borrowed, if it be loaned for use, or to return its kind and value if it be loaned for consumption. Therefore, according to authority, analogy, and reason, as the word "borrowed" in the writing signed by the defendant imports an acknowledgment by him that he had agreed to refund the amount borrowed, or was under a legal obligation to do so, the writing contains an express covenant to pay it at the time designated, to wit: the 20th of February, 1827. "This is to witness that I have borrowed £10 from C. D." (Signed) A. B., is a covenant to pay the £10. Bac. Ab., Covt. B.

"Implied" covenants apply only to real estate. But there is no analogy between them and such as this. They are covenants which are not inferred from the words, according to their popular or grammatical import, but are deduced by operation of law as arbitrary, and merely legal consequences, flowing from certain technical terms, which do not, of themselves, in their common use, mean what they are thus made to imply; for example, the law implies a warranty from the words "demise and grant," when used in a lease, though they, in fact, no more import a warranty than "sell and convey" would in a deed, bargain, and sale.

A covenant which the words import, when understood according to their common practical or grammatical signification, is not an "implied," but is an express covenant. Such is the covenant in this case; for if, as we have decided, the contract was not a conditional sale, the consequence seems not only rational, but almost inevitable, that it contains a covenant to refund the money which the word "borrowed," ex vi termini, imports.

Wherefore, it seems to this court, that the Circuit Court erred in sustaining the demurrer to the plaintiff's declaration; and therefore the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

WEEKS v. BAKER.

Supreme Court, Massachusetts, 1890.

[152 Mass. 20.]

REPLEVIN of a sail-boat. At the trial in the Superior Court, without a jury, before Sherman, J., there was evidence tending to prove the following facts.

On October 26, 1881, the plaintiff, who then owned the boat, gave a mortgage upon it to the defendant for eighty-six dollars, which contained a power of sale in the usual form, and was made payable in two years. The defendant, in January, 1889, took possession of the boat, a balance of the mortgage debt then remaining unpaid, whereupon the plaintiff tendered to him the sum of thirty-one dollars and fourteen cents, which was more than was due on the mortgage at the time; but the defendant refused to accept it. The defendant duly sold the boat under the power in the mortgage, and bought it himself; and the plaintiff replevied it. There was no evidence of any demand by the defendant upon the plaintiff.

The defendant asked the judge to rule that the plaintiff could not maintain this action without paying the amount tendered by him into court, or renewing the tender at the trial, or then offering to pay to the defendant the amount so tendered him. The judge declined so to rule, and found for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar by the plaintiff, in March, 1890, and submitted on a brief by the defendant, and afterwards was submitted on the briefs of both parties to all the judges, except Morton, C. J.

Knowlton, J. The plaintiff, who was a mortgager of the property replevied, tendered to the defendant, the mortgagee, more than the amount due on the mortgage, but the defendant declined to receive it, and afterwards sold the property under the mortgage, and became the purchaser at the sale.

A mortgage conveys an estate or title defeasible on the performance of a condition subsequent. If the condition is performed according to its terms, the mortgage immediately becomes void, and the mortgagee is devested of his title. Tender of performance has the same effect. Darling v. Chapman, 14 Mass. 101; Edwards v. Farmers' Loan Co.,

21 Wend. 467; Kortright v. Cady, 21 N. Y. 343; Mitchell v. Roberts, 17 Fed. Rep. 776. If the possession of the property is withheld, the mortgagor may immediately bring an action at law to obtain it. This rule applies to mortgages of personal property as well as to mortgages of real estate. But in this Commonwealth a mortgagor's right of redemption of real estate after condition broken is only equitable.

At common law the title of a mortgagee of personal property upon breach of the condition became absolute. "No process of foreclosure was necessary, and there was no right of redemption. Burtis v. Bradford, 122 Mass. 129. In some of the States a subsequent equitable right of redemption in the mortgagor has been recognized, and in others the courts have been quick to lay hold of any facts from which the doctrine of waiver could be evoked to defeat the absolute right of the mortgagee.

In this Commonwealth, while it is held that a mortgage of chattels differs from a mere pledge, and passes the general property to the mortgagee, the statute has created a right of redemption in the mortgagor, after condition broken, which continues until foreclosure by sale, or by notice given and recorded in the mode prescribed. Sts. c. 192, § 5. This is a right of property in the mortgagor, which limits the right and title of the mortgagee. It is not an equitable right in the sense that the interposition of a court of equity is required to enforce it; but it is a legal right, growing out of the statute under which the parties make their contract. Boston & Fairhaven Iron Works v. Montague, 108 Mass. 248; Gordon v. Clapp, 111 Mass. 22; Stone v. Jenks, 142 Mass. 519. The method of redeeming is stated in § 6 of c. 192 of the Public Statutes, which is in these words: "The person entitled to redeem shall pay or tender to the mortgagee, or to the person holding under him, the sum due on the mortgage, or shall perform or offer performance of the thing to be done, and shall pay all reasonable and lawful charges and expenses incurred in the care and custody of the property, or otherwise arising from the mortgage; and if upon such payment or performance, or upon tender thereof, the property is not forthwith restored, the person entitled to redeem may recover it in an action of replevin, or may recover in any action adapted to the circumstances of the case such damages as he may sustain by the withholding thereof." The mortgagor redeems when he pays or tenders the sum due, or performs or offers performance of the thing to be done. His right of property then becomes complete and absolute. By the terms of the statute, a tender of payment is equivalent to payment, and an offer of performance is as effectual as performance. He becomes entitled to have the property "forthwith restored," and upon a failure to restore, he has a perfect legal remedy.

This statute gives the payment or tender of payment of the debt, and all proper charges, at any time before foreclosure, the same effect upon the rights of the parties in the property which it would have had if made when the debt was due. In either case, if the mortgagee refuses

the tender, he may afterwards sue for his debt, but he loses his security. He is subject to the same rule that applies to the refusal by a pledgee of payment tendered by a pledgor of goods. In such a case, the pledgee's security is gone, although the debt remains. Coggs v. Bernard, 2 Ld. Raym. 909, 917; Bac. Abr., Bailment (B); Jarvis v. Rogers, 15 Mass. 389; Hancock v. Franklin Ins. Co., 114 Mass. 155, 157; Cumnock v. Newburyport Savings Institute, 142 Mass. 342; Mitchell v. Roberts, 17 Fed. Rep. 776; McCalla v. Clark, 55 Ga. 53; Ball v. Stanley, 5 Yerger, 199. It is said that a creditor who refuses to receive his money for a debt when lawfully tendered cannot complain at the loss of his security for that debt, because, in the words of Littleton, "it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him." Co. Litt. 207 α.

In those States where a mortgage is treated as a lien, the same principle is applied to a tender of payment of a mortgage debt after condition broken at any time before foreclosure, without a requirement of statute to that effect. Edwards v. Farmers' Loan Co., 21 Wend. 467; Kortright v. Cady, 21 N. Y. 343; Potts v. Plaisted, 30 Mich. 149; Caruthers v. Humphrey, 12 Mich. 270; Swett v. Horn, 1 N. H. 332. It is also applied to a tender of payment of a debt secured by a mechanic's lien. Moynahan v. Moore, 9 Mich. 9.

We have been referred to no precedent for holding, in accordance with the defendant's contention, that a plaintiff before bringing his suit should carry into court the money tendered, or that, having brought a suit which he had a right to bring, his right to maintain it will be forfeited unless he makes profert of money at the time of entering his writ. The rights of the parties to an action are ordinarily to be determined as of the time of bringing the suit. This is always so unless something that has afterwards occurred which may properly be pleaded is shown in defence. The Legislature could not have intended that, after a tender and refusal of payment of a debt secured by a mortgage of personal property, the title should oscillate between the mortgagor and mortgagee, according to their subsequent changes of conduct in reference to the tender. Besides, in the present case, there was no proof or offer of proof that the money was not kept ready for the mortgagee. The opinion in Roberts v. White, 146 Mass. 256, does not refer to the statute which we are considering. The question there was in regard to a tender made by a defendant in an action of replevin after the suit was brought; and the language had reference to such a tender set up in defence, when the title and right of possession at the date of the writ were not in dispute. In the opinion of a majority of the court, the ruling requested at the trial was rightly refused.

Exceptions overruled.

B. Extent of Right to Redeem.

KENDALL v. EQUITABLE LIFE ASSURANCE SOCIETY.

SUPREME COURT, MASSACHUSETTS, 1898.

[171 Mass. 568.]

BILL IN EQUITY, filed July 29, 1897, in the Superior Court, against the Equitable Life Assurance Society of the United States, a corporation, Frank A. Russell, individually and as trustee, and the executors of the will of Daniel W. Russell, for the redemption and reassignment to the plaintiff of a policy of insurance.

LATHROP, J. The defendants other than the assurance society contend that, as the justice who heard the case decided it in favor of the plaintiff's third contention, she is not a party aggrieved, within the Pub. Sts. c. 151, § 13, and has no right of appeal. For this position Copp v. Williams, 135 Mass. 401, and Downs v. Bowdoin Square Baptist Society, 149 Mass. 135, are cited. These cases state the familiar rule that, if a party asks for a certain ruling and it is given, he has no ground of exception. But the contentions in the case before us were in the alternative, and the plaintiff would not be precluded from arguing the correctness of the other contentions, if the case came here on exceptions. The case is here on a report, after an appeal by both parties, and all questions of law are open.

The first contention of the plaintiff is that on the facts of the case the plaintiff is entitled to a reassignment of the policy without paying any amount to the defendants or any of them. The argument in support of this contention is that the contract on the part of the wife was one of suretyship, and that the note was paid by the renewal of it without her knowledge. We are of opinion, however, that the wife did not stand in the relation of a surety to her husband. Both she and her husband at the time of the assignment had an interest in the policy. By its terms, on July 25, 1897, provided the policy had not been terminated by lapse or by his death, he had the option, first, to withdraw in cash the policy's entire share of the assets of the insurance society, namely, the accumulated reserve, which was expressed to be \$3,535.40, and in addition thereto the surplus apportioned by the insurance society; or, secondly, to convert the same into a paid-up policy. The interest of the wife was contingent upon her husband's death before July 25, 1897. Each could assign his or her interest. But neither could assign the interest of the other, or defeat it in any way. The fact that it was payable to him in a certain contingency, which did not happen, is immaterial. Pingrey y. National Life Ins. Co., 144 Mass. 374, 383.

The husband and wife having these interests in the policy, the husband wished to pledge it for his debt, and obtained the assignment of the policy by the wife, absolute in form. We see in this alone no contract of suretyship. While the guaranty contained in the assign-

ment may have been lost by the giving of time, it does not affect the legal consequences of the assignment.

We are also of opinion that the note given for the original debt cannot, as matter of law, be said to have been paid by the second note. Whether this note operated as payment of the first note was a question of fact, depending on the intention of the parties and the other circumstances attending the transaction. Agawam National Bank v. Downing, 169 Mass. 297.

The plaintiff's second contention in the court below was, that, if she was liable to pay anything to redeem her policy, she was entitled to an assignment upon paying the aggregate amount of the quarterly premiums paid by the Russells, together with interest thereon from the date of the payment thereof at six per cent per annum. The third contention was, that in no event was she bound to pay more than the amount of the original loan with interest at six per cent and the quarterly premiums, with interest thereon at six per cent from the date of payment. The judge entered a decree in favor of the plaintiff, based upon her third contention.

The findings of fact do not make it entirely clear whether the plaintiff pledged her interest in the insurance policy as security for the original debt or for the original note. The judge finds as a fact "that she did not ever consent or agree that the policy should be pledged or held by said Russell as security for any debt other than the note of \$1,900, and interest thereon. She had no knowledge or notice that the said Russell claimed to hold said policy as security for any debt other than the original debt of \$1,900, and interest thereon, until after the death of said Josiah B. Kendall, nor did she authorize her husband to pledge it for any other debt." The note was for \$1,900, payable six months from date, with interest after maturity at the rate of two per cent a month. This was a legal contract by the plaintiff's husband, who signed it. Pub. Sts. c. 77, § 3. He it least was bound to pay the interest stipulated until payment or until the claim for principal and interest was judicially determined. Brannon v. Hursell, 112 Mass. 63; Union Institution for Savings v. Boston, 129 Mass. 82; Lamprey v. Mason, 148 Mass. 231; French v. Bates. 149 Mass. 73, 79; Handy v. Tracy, 150 Mass. 524; Schmidt v. People's National Bank, 153 Mass. 550; McDonald v. Faulkner, 154 Mass. 34.

If, therefore, the finding of the judge is to be construed as a finding that the plaintiff pledged her interest in the policy as security for the note, a different rate of interest should have been allowed. But we do not so construe the finding. The latter part of the finding refers directly to the original debt, and the decree is based upon this finding.

The next question is as to the effect of the assignment of the policy, which was in form absolute. If the only authority which the wife gave the husband was to pledge her interest in the policy for the orig-

inal debt, he was not her agent either to make the original note in the form in which it was made, or to make new notes; and the fact that the assignment was absolute in form is immaterial. The consideration and the purpose of the transaction could be shown by oral evidence. Riley v. Hampshire County National Bank, 164 Mass. 482, 486.

The first part of the decree was, therefore, right.

The remaining question is as to the correctness of the last part of the decree, which obliges the plaintiff to repay the amount of all the premiums paid by Daniel W. Russell or his estate, with interest on each premium from the date of its payment to the date of repayment, at the rate of six per cent per annum.

We are of opinion that the decree in this respect was right. The plaintiff joined in pledging the property as security for a debt. The pledgee had to pay the premiums in order to keep the policy alive. We have already said that she must pay the debt with simple interest thereon; and it is only equitable that she should repay the premiums paid by the pledgee, with simple interest from the time of each payment. This is not the case of a mere volunteer paying the premiums, or the part owner of a policy, as In re Leslie, 23 Ch. D. 552. Nor is it the case of a payment made by a mortgagor to preserve the property, as in Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234. It is the case of a payment by a pledgee, who had a right, as against the pledgor, to keep the pledge alive. 'See Warnock v. Davis, 104 U. S. 775; Scobey v. Walers, 10 Lea, 551; Harley v. Heist, 86 Ind. 196; Raley v. Ross, 59 Ga. 862.

MOONEY v. BYRNE.

COURT OF APPEALS, NEW YORK, 1900.

[163 N. Y. 86.]

Vann, J. The case made by the complaint was that of a mortgagor with a right to redeem from a mortgagee or his devisees in possession. The defendants denied that there was any mortgage, alleged an absolute conveyance from the plaintiff to one Owen Byrne, and a subsequent conveyance from the latter to a bona fide purchaser. They also pleaded the statute of limitations and specified the period of six and ten years as the limit exceeded by the plaintiff in bringing her action.

The facts agreed upon by the parties and admitted by the pleadings are in substance as follows: On the 14th of August, 1878, the

plaintiff owned and was in possession of a parcel of land in the city of New York worth \$10,000 and upwards, and at the same time she was indebted to Owen Byrne in the sum of about \$3,000, secured by three mortgages on said premises, which were under process of foreclosure. In order to secure the payment of this indebtedness she conveyed the land to said Byrne at his request by a deed dated on the day last named and duly recorded. "The said deed was given as security" and for no other purpose. It contained full covenants. subject to said mortgages, which, as it was declared, "shall not merge in the fee, but shall remain valid and subsisting liens." Said Byrne at the same time gave back a defeasance of even date whereby he agreed to reconvey to the plaintiff upon the payment to him, within one year, of said indebtedness, certain advances which he agreed to make for her benefit and the costs of the foreclosure proceedings. was stipulated that she should be relieved from personal liability on the bonds and that no judgment for deficiency should "be claimed or entered against her in any action that may be taken upon said bonds or mortgages, so long as she and all persons claiming under her shall not dispute or contest the title of the" said Byrne "or his assigns to said mortgaged premises or the amounts due him on said mortgages. . . ." Said instrument also provided "that as to the agreement by the" said Bryne "to reconvey said premises, time is of the essence thereof, and, further, that this instrument shall not be recorded by or on behalf of the" plaintiff, "and that for a violation of this provision, this agreement, so far as the same provides for such reconveyance, shall thereupon become utterly null and void." The defeasance was never recorded.

Said Byrne at once took possession of the premises and remained in possession thereof until the 13th of June, 1881, when he conveyed to one Walker by a deed duly recorded, but "said conveyance was made without the consent of the plaintiff, who had no knowledge of it until this action was begun" on the 7th of March, 1895.

Said Byrne died on the 11th of January, 1889, leaving a will by which he gave all his property, real and personal, to the defendants. His executor accounted and has been discharged, and the property of the testator has been delivered to the defendants. The plaintiff claimed that the rents and profits of the premises received by Byrne amounted to more than the principal and interest of the debt secured. She alleged in her complaint that if Byrne had conveyed the premises to any one, such conveyance was made without her knowledge or consent. She demanded an accounting as to the amount due from her, and that she might "be at liberty to redeem said mortgaged premises upon payment of whatever may upon such accounting be found due, which this plaintiff hereby offers to pay," and that the defendants be compelled to convey said premises to her. She also demanded alternative and general relief. Said Walker, who still owns the premises, was not made a party to the action. The

trial judge dismissed the complaint upon the ground that "the statute of limitations is a conclusive defence," and the Appellate Division affirmed, on an opinion rendered in overruling a demurrer to the answer, when the case was in the first department. 15 App. Div. 624; 1 App. Div. 316.

The facts agreed upon show that there was a mortgage; for a deed, although absolute on its face, when given as security only, is a mortgage by operation of law. Horn v. Keteltas, 46 N. Y. 605; Meehan v. Forrester, 52 N. Y. 277; Odell v. Montross, 68 N. Y. 499; Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1, 5; Kraemer v. Adelsberger, 122 N. Y. 467; Macauley v. Smith, 132 N. Y. 524; 15 Am. & Eng. Encyc. 791; 1 R. S. 756, sec. 3; Laws 1896, ch. 547, sec. 269. While there was no covenant to pay the debt, none was needed, for the property was worth much more than the amount of the indebtedness and the mortgagee could safely confine his remedy to the land. 1 R. S. 739. The absence of such a covenant, the conditional release of any claim for deficiency, and the agreement not to record the defeasance, are of no importance in view of the express admission that the deed was given as security. The deed and defeasance were executed at the same time, and, as the latter in express terms refers to the former, they must be construed the same as if both were embodied in a single instrument. When read together in the light of the admission that the object was to secure a debt, it is clear that the transaction was not a conditional sale and that the covenant making time the essence of the contract to reconvey has no more effect than if it occurred in the defeasance clause of an ordinary mortgage. An instrument executed simply as security cannot be turned into a conditional sale by the form of a covenant to reconvey, and even if there was a doubt as to the meaning the contract would be regarded as a mortgage, so as to avoid a forfeiture, which the law abhors. Matthews v. Sheehan, 69 N. Y. 585. As was said by the Supreme Court of the United States: "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when it is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. . . . It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates." Peugh v. Davis, 96 U. S. 332, 336.

The right to redeem is an essential part of a mortgage, read in by the law if not inserted by the parties. Although many attempts

have been made, no form of covenant has yet been devised that will cut off the right of a mortgagor to redeem, even after the law day has long passed by. Clark v. Henry, 2 Cow. 324, 331; Jones on Mortgages, sec. 1039. Even an express stipulation not to redeem does not prevent redemption, because the right is created by law. For the same reason an express power to sell at private sale after default is of no effect. "If," said Chancellor Kent, "a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule that the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance in which the creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open the door to the most shameful imposition and abuse." Hart v. Ten Eyck, 2 Johns. Ch. 62, 100. The utmost effect claimed for the provision that the defeasance was not to be recorded is that it was a consent to a private sale after default. As was well said by a recent writer: "If the instrument is in its essence a mortgage, the parties cannot by any stipulation, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default, is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right." 3 Pomeroy's Eq. Jur. sec. 1193. So Mr. Thomas says that "it was a bold but necessary decision of equity that a debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem." Thomas on Mortgages, sec. 9.

To prevent undue advantage through inadequacy of consideration, either with or without an opportunity to repurchase, the courts are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor a conditional sale, but a mortgage, and that the grantor and grantee have merely the rights and are subject only to the obligations of mortgagor and mortgagee. Lawrence v. Farmers' L. & T. Co., 13 N. Y. 200. In the case before us there was no purchase of the land by Owen Byrne, for the existing relation of debtor and creditor between himself and the plaintiff was not ended, but was continued by a contract intended to secure the old debt, together with some further advances. He had a lien on, but no estate in, the land. Thorn v. Sutherland, 123 N. Y. 236; Hubbell v. Moulson, 53 N. Y. 225, 228. She had the right to redeem and he the right to hold the land until she redeemed,

or her right of redemption was cut off by the judgment of a court of competent jurisdiction. The continued existence of the debt is the birthmark of a mortgage, and that is involved in the concession that the land was conveyed as security. The passing of the law day did not extinguish her right, for "once a mortgage always a mortgage" is a maxim so sound and ancient as to be a rule of property. As the deed was a mortgage when given, it did not cease to be a mortgage after the period of redemption had expired. In Macauley v. Smith, supra, it was held that the surrender of possession by the grantor to the grantee, after the debt became due, did not prevent the levy of an attachment, issued in behalf of creditors of the former, upon lands conveyed to the latter as security.

The plaintiff, therefore, is a mortgagor, whose right to redeem from the mortgagee in possession has not been cut off nor cut down by any act or omission on her part. As the defendants stand in the shoes of Owen Byrne with no rights except by way of gift under his will, the case is the same in principle as if he were living and the sole defendant. After the plaintiff had established her right to redeem, as to him, what answer could he make thereto? Would it be an answer for him to say, "I have conveyed the lands away, and, therefore, you cannot redeem"? While this would be a conclusive answer in behalf of Walker, the present owner of the land, if he had been made a party and the right to redeem had been asserted against him, can Owen Byrne or his devisees say that, by his wrongful act in conveying the land, he deprived the plaintiff of the right to redeem, in any form, and confined her to an action for the moneys received on the sale, to which the statute of limitations would be a bar? Can a mortgagee, by his own act, without a judicial sale or the consent of the mortgagor, destroy the right to redeem, which is so carefully guarded by the courts? The mortgagee could not, by selling the mortgaged premises, change the rights of the plaintiff as against himself. As to him, she still has the right to redeem, for by his act, without her knowledge or consent, he could not annul his covenant to reconvey. That covenant is still in force, and the plaintiff may compel its performance, so far as the rights of third parties, acquired under the Recording Act, will permit. As Owen Byrne conveyed to a bona fide purchaser, the plaintiff cannot follow the land, as such, but she is not prevented by that wrongful act from any form of redemption now practicable. No act of his could utterly destroy her cause of action to redeem. He might affect its value, but he could not take its life. As a substitute for a decree requiring him to repurchase the land and convey it to her, which might be impossible and would be apt to involve hardship, she may treat the value of the land, measured in money presumed to be in his hands when her right to redeem was established, as land, and enforce the right to redemption accordingly. Unless we virtually sanction his wrongdoing by permitting him to defeat her right of redemption absolutely

by his own act, upon showing a right to redeem, she must be permitted to make the best redemption possible as against him. Because he has put it out of his power to render to her all she is entitled to. he cannot refuse to make the nearest approach to it that is left. A court of equity, in order to bring about an equitable result, disregards forms and treats money as land and land as money, when required to prevent injustice. A mortgagee in possession under a recorded deed, absolute on its face, with an unrecorded defeasance, cannot sell the land and claim that the purchase price is money, as against one who has an equitable right to insist that in legal effect it is land. As the plaintiff established a right to redeem, Owen Byrne and his devisees cannot complain if, in working out the relief required by the violation of his covenant, the court does the best it can to right the wrong by treating the money as land. In order to prevent him from making a profit out of his wrong, the law raises the presumption that he now has the full value of the land as a separate fund in his hands, and treating it as land allows the plaintiff to redeem, the same as if it were in fact land. As against the wrongdoer and his estate, it will exert all its power to make the plaintiff whole, paying due regard to equities arising through improvements upon the land, so as not to give her more than she is equitably entitled to.

Thus in Meehan v. Forrester, supra, the court through Rapalol, J., said: "The sale was shown to have been made without the consent of Meehan and in violation of his rights, and it does not appear that the plaintiff ever had notice of it. He was not bound by such a sale. He was entitled to his land, on payment of the amount due to Bertine or his representatives. If Bertine, by reason of his own wrongful act, had deprived himself of the ability to restore the land to which the plaintiff is equitably entitled, he or his representatives were bound to account to the plaintiff, at his election, either for the proceeds of sale of the land, or its value at the time when the plaintiff's right to such reparation was established. Hart v. Ten Eyck, 2 Johns. Ch. 117; Peabody v. Tarbell, 2 Cush. 227, 233; May v. Le Claire, 11 Wall. 236, 237."

In that case, as in this, the only cause of action alleged or proved was the right to redeem; but as the premises had been wrongfully conveyed, the plaintiff, upon establishing such right, was awarded compensation on the basis of value at the time of the trial. Compensation was allowed as an equitable substitute for actual redemption. In other words, the land which should have been conveyed was appraised by the court, and the defendant compelled to restore the amount of the appraisal, as the only method of redemption possible. The form of relief granted was a money judgment, but that was possible only because a right to redeem had been established, for without that right the relief would be limited to the proceeds of the sale. Baily v. Hornthal, 154 N. Y. 648, 661. So in the case

at bar, the plaintiff established the same right, but the defendant showed that he had placed it beyond his power to reconvey. Thereupon in rebuttal and not as a part of her cause of action, the plaintiff had the right to prove the present value of the land, so as to follow the money presumed to be in the defendant's hands, and redeem that which he had wrongfully substituted for the land, the same as if it were in fact land. Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit. v. Le Claire, 78 U. S. 217; Van Dusen v. Worrell, 4 Abb. Ct. App. Dec. 473; Miller v. McGuckin, 15 Abb. N. C. 204; Hart v. Ten Eyck, 2 Johns. Ch. 62, 108; Enos v. Sutherland, 11 Mich. 538, 542; Budd v. Van Orden, 33 N. J. Eq. 143; s. c. id. 564. When he cannot restore the land it will compel him to restore that which stands in his hands for the land, and will not permit him to assert that it is not land when the assertion would be profitable to himself but unjust to the one whom he wronged. He cannot escape by offering to pay what he received on selling the lands, but must pay the value at the time of the trial. He cannot cut off the right of redemption and convert it into a personal liability, for he is still a mortgagee, and subject as such to the mortgagor's rights. The fact that the injured mortgagor need not take the proceeds of the sale, but may insist on the proved value of the land, as well as the pleadings and proofs, shows that this is a pure action to redeem, and must be so regarded for all purposes, including the defence of the statute of limitations. While the mortgagor is helpless as against his grantee, she is not helpless as against him.

The defendants insist that as the plaintiff can only recover a money judgment, the cause of action is in the nature of an accounting for money had and received, and hence that the six-year, or at most the ten-year statute of limitations is a bar. This is not an action, however, to recover money, but to redeem land from a mortgage, and but for the misconduct of the defendant would have resulted simply in a judgment of redemption, with an accounting for the rents and profits of the land, after payment of the debt by the plaintiff, according to her demand and offer before the commencement of the action. The period of limitation provided by the code, within which an action to redeem from a mortgage may be maintained, is twenty years after breach of the condition or the nonfulfilment of the covenant therein contained. Code Civ. Pro. sec. So far as the defendants are concerned, the plaintiff had a right to redeem. She brought her action to redeem and established it by evidence, and was entitled to judgment accordingly, but as that judgment would be ineffectual because the mortgagee had sold the land, equity will simply vary its relief from a judgment of redemption in land to a judgment of redemption in money representing

the land. If the plaintiff had not elected to redeem, but to sue for money had and received to her use, the case of Mills v. Mills, 115 N. Y. 80, relied upon by the defendants, might be an authority. that case, however, as was stated by this court, "all the relief asked for in the complaint is an accounting and a judgment for a sum of money, and no other relief was needed or possible upon the facts established. This was in no sense an action to redeem, as there was no mortgage and nothing to redeem." The relief demanded, as anpears from the appeal book on file in this court, was simply a judgment "for all moneys received by" the defendant. No claim was made that the two transactions, which were four years apart, constituted a mortgage, or that there was ever a right to redeem. The theory of the action was that the defendant lawfully sold the land and should account for the proceeds, after deducting his own claim. Thus, the court said: "Absolute title to the lands was vested in the defendant, evidently with the intention that he might sell them and reimburse himself, and pay over any surplus to his brother." The fundamental fact that the defendant sold without right was wanting in that case, and hence the principle, which is the basis of our judgment, could not be applied. It is the wrongful conveyance by the mortgagee in possession, under a deed absolute on its face, that enables a court of equity to hold on to the case after ordinary redemption has been shown to be impossible, and to allow such a redemption against the wrongdoer as will prevent him from gaining by his wrong, and will give the plaintiff her due as nearly as may be.

The judgment appealed from should be reversed and a new trial granted, with costs to abide event.

PARKER, C. J., BARTLETT, MARTIN and WERNER, JJ., concur; GRAY, J., not voting; Cullen, J., not sitting.

Judgment reversed, etc.

LANGTON v. WAITE.

CHANCERY, 1868.

[L. R. 6 Eq. 165.]

In December, 1865, the plaintiff, Charles Langton, borrowed, through his stockholders, Price & Pott, from the defendants, Foster & Braithwaite, also stockbrokers, a sum of £6,000 for three months at 7½ per cent interest, upon the security of £22,000 Grand Trunk of Canada

Railway stock, which was transferred by the plaintiff, and registered in the name of the defendant, Henry Waite, one of the members of the firm of Foster and Braithwaite, on the 6th of January, 1866. In the middle of February, 1866, the plaintiff contracted to sell the £22,000 stock at 42 per cent. To enable him to complete that contract he applied to the defendants, Foster & Braithwaite, through his agents, Price & Pott, to allow him to pay off the £6,000, with the full amount of interest (six weeks having elapsed) up to the 28th of March. application was made by Price & Pott on behalf of their principal, but not naming him, in a letter dated the 16th of February, 1866. This application was declined by the defendants, on the ground that the Grand Trunks were negotiated for the account at the end of March. In consequence of this refusal by the defendants, before the expiration of the three months the plaintiff was obliged to pay to his purchaser the difference between the price at which he had sold the stock and the price at which the same amount of stock was subsequently bought by the purchaser, which was 46 per cent, that difference being £880. The plaintiff, in pursuance of his contract, repaid to the defendants the sum, £6,000, with interest, at the expiration of the three months, and they re-transferred £22,000 similar railway stock into the name of the plaintiff on the 28th of March, 1866. The plaintiff subsequently discovered that the defendants had, on the 14th and 15th of February, 1866, two days before their refusal to accept payment of the loan, sold the stock so deposited with them at the price of about 46 per cent, and had afterward re-purchased other stock at a much lower price, that is, at about 30 or 32 per cent, which re-purchased stock was that which was retransferred to the plaintiff at the expiration of the loan, by which it appeared that the defendants had made a profit of about £3,000 by the loan transaction.

The bill prayed that an account might be taken of the money produced by the sale, and the plaintiff claimed to be entitled to the profit realized by the defendants.

SIR R. MALINS, V. C. The demand made by the plaintiff in this bill is resisted by the defendants on three grounds.

With regard to the first of their objections, the law is clearly settled that a principal may sue upon a contract entered into on his behalf by an agent, although his name was wholly concealed at the time of the contract. In Smith's Mercantile Law, 3d ed., p. 134, the rule is correctly stated to this effect.

The recent and very important case of Grissell v. Bristowe, Law Rep. 3 C. P. 112, also entirely supports that rule. In that case the majority of the Court of Common Pleas decided that there was that liability on the part of the defendants, who were the jobbers, who purchased nominally from Barry & Co., but in reality from Grissell. The case of Mortimer v. M'Callan, 6 M. & W. 58, was one in which an undisclosed principal was made liable upon a similar contract through a broker on the Stock Exchange for the sale of stock; and many instances

have occurred where, upon a member of the Stock Exchange becoming a defaulter, his books have been handed over to the committee of the Stock Exchange, or to the official assignee appointed by them, and contracts which he had made, and upon which he, as a member of the house, was personally responsible, have been enforced against his undisclosed principals, the money recovered being applied towards payment of the defaulter's debts to other members of the Stock Exchange. In the present case the parties were brokers on both sides. and from their very position the defendants must have known that Price & Pott were merely agents for the borrower; and if there had been any doubt upon that subject it must have been removed by the production of the transfer of the £22,000 stock executed by the plaintiff; and in the letter of the 16th of February Price & Pott speak of their principal. It is also to be observed that Price & Pott would have precisely the same remedies against the defendants as the plaintiff has. if they were to be treated as principals. No injustice can therefore be done to the defendants by their being sued by the plaintiff as principals instead of as agents, and I am of opinion, for these reasons, that the first ground of defence wholly fails.

The 49th rule of the Stock Exchange is in these terms: "The Stock Exchange does not recognize in its dealings any other parties than its own members; every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the regulations and usages of the house; and should a principal, without the consent of the committee, attempt to enforce by law, a claim against a member of the Stock Exchange, the committee will decide as to the liability of the broker or agent of such principal for any cost or damages incurred in consequence of legal proceedings." The 49th rule, therefore, which was relied upon by the defendants, makes all stockbrokers principals as between themselves, but it does not take away the right of the principals to sue in respect of their own rights in their own names.

As to the second ground of defence, that the sale of the stock was in accordance with the rights of the defendant and the contract between the parties, the law is perfectly clear; and it was not disputed by the defendants' counsel that, in the absence of express contract, the pawnee of property cannot sell it until the debt for which it is pledged becomes payable, and if he does so, the owner has a right to charge the pawnee with the price he gets for the property, if he finds it to his interest to do so. In the present case there was clearly no contract or right to sell the stock, and I am of opinion that the second ground of defence also fails.

The third and last ground of defence was the one mainly relied upon by the defendants' counsel, namely, that the custom of the Stock Exchange gives the lender of money on security a right to sell the security whenever he thinks proper. If there be such a custom, it would be manifestly unjust: the borrower would be completely at the mercy of

the lender, who might convert the security and appropriate the proceeds to his own use, and at the expiration of the period of the loan be wholly unable to return to the borrower what belonged to him. But is there such a custom? On the part of the plaintiff, no less than eight stockbrokers gave evidence upon the subject, and they speak in very distinct terms: Mr. Price, who was the agent in this transaction, says "that there is no rule or custom of the London Stock Exchange authorizing a person by whom a loan is made for a fixed period, upon the security of stock transferred into his name, to sell such stock during the period for which the loan is made, and that stock so pledged is treated only as collateral security for the repayment of the loan." In that statement he is supported by Mr. Zoete, the deputy chairman of the committee of the Stock Exchange, who speaks in precisely the same terms, denying that there is such a custom. Then there are the affidavits of six other stockbrokers of great experience, who all speak to the same effect. This evidence is positive and distinct that there is no such custom. This is attempted to be met by the defendants by the evidence of other stockbrokers; but, on looking at their evidence, it is in far less distinct terms, and I do not think it amounts to a contrary statement; and, indeed, it would be surprising if there were any right in the lender of money to sell the pledge. I will take, as an example, the evidence of Mr. Scott, who says: "As to rule 64, I have no doubt that this rule is always acted upon. A lender may transfer the security deposited with him during the currency of the loan, but when the time has elapsed the lender must transfer to the original borrower the identical security deposited. When stock has been deposited as security. there is no means of identifying the stock deposited. It is the practice at the Stock Exchange to deal with stock in this way: where the stock deposited cannot be identified, it is sufficient to re-transfer the like amount of stock. It is impossible to raise any objection on the want of identity on the security of stock. I have heard it stipulated that security of this description should not be transferred. In the absence of such stipulation I have never heard, before this case, a complaint that the security had been transferred. The object of such a stipulation would probably be to prevent such security being thrown on the market: Such a stipulation might very materially lessen the value of such security as a security. A dealer without this right of transfer would probably require a larger percentage on the loan. I should myself decline to lend money at all, unless I had power to make use of the security. In the absence of any stipulation, I consider that the lender may always transfer. According to the practice of the Stock Exchange the seller is bound to transfer at the price named by the buyer. If A. sells stock to B., he is bound to transfer to B.'s nominee at the price B. chooses to name. The consideration stated in the transfer is no evidence," and so forth. Mr. Charles Wood says: "I have been a considerable dealer in consols. Where money has been advanced on the security of consols it is invariably the custom for the lender to

deal with the consols while the loan is running. A lender would take it for granted that he had such power of transfer. I have never known it stipulated that consols should not be dealt with; business could not be carried on unless there were that power — it would require so much more capital." Mr. Paine and Mr. Mortimer speak to the same effect. These witnesses speak of using the security, which may well mean the right of transferring the mortgage or pledge - a right which is not disputed by the plaintiff. That is, they might transfer the mortgage. or they might sub-mortgage. The lender, under such circumstances. might suddenly want his money, and it would indeed be a very hard rule, if he wanted the money he had lent for a certain purpose, if he could not transfer the security to another. That is a right that is not disputed by the plaintiff, and that is a right that I should consider the lender of money upon any security whatever would have. But there can be no custom in opposition to an express rule. Now, I consider the 64th rule of the Stock Exchange conclusive upon the subject. That rule is in these few, but very distinct, words: "In all cases of loans on the deposit of security, the lender is bound to return the identical securities deposited, unless it be otherwise stipulated at the time of making the loan. But this liability does not apply to a member who has taken in stock or shares upon continuation at the market price." How can the identical security be re-transferred if the lender is at liberty to sell it? I am therefore of opinion that this rule is conclusive upon the point, and shows that the evidence of the eight brokers who have made affidavits for the plaintiff is perfectly correct. I am of opinion that the alleged custom is in direct opposition to the express rule, and has, consequently, no existence. There is no such custom, and the rule obliges the lender to return the identical security which is pledged for the loan. It was argued for the defendant that the stock could not be identified, but it appears to me there is no such difficulty in identifying stock as was suggested. It is the constant practice of this court to trace and identify stock when it has been improperly dealt with. The principle that the pawnee of stock has no right to sell, and that if he does so he must be charged with the price it produced, whatever may be the subsequent reduction in its value, is established by the case of Ex parte Dennison, 3 Ves. 552. That case, I take it, goes the whole length of the principle upon which I intend to decide the present case. I am therefore of opinion that the defendants had no right to sell the stock pledged to them, and that, having done so, they must be charged as between themselves and the plaintiff with the amount which was produced by the sale. It must be observed that, if it had not been for this wrongful sale on the part of the defendants, they would undoubtedly have been ready to re-transfer the plaintiff's stock in the middle of February, 1866, and he would have been saved the loss which their conduct has forced upon him. The result is, that there must be a declaration that the defendants were not entitled to sell the £22,000 Canada Trunk Railway stock which was deposited with

them; and there must be an account taken of what was produced by the sale. From such account there must be deducted the £6,000, and interest up to the 28th of March, and the defendants must pay the balance of the amount so found due; and the plaintiff must, as he offers by his bill, re-transfer to the defendants, or account to them for the value of the £22,000 stock which they re-transferred into his name; and the defendants must pay the costs of the suit. The defendants must also be charged with interest at 5 per cent upon the money that is due, from the 28th of March, 1866.

C. Purchase of Equity by Mortgagee.

VILLA v. RODRIGUEZ.

SUPREME COURT, UNITED STATES, 1870.

[12 Wall. 323.]

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States for the District of California. The appellant was the complainant in the court below. The decree was against him.

He seeks to redeem the premises in controversy according to the prayer of his bill. The defendant, Rodriguez, claims an indefeasible estate in them as regards the complainant and those from whom he derives title. The other defendants claim under a contract of purchase made with Rodriguez. The validity of the complainant's title, if his grantor had anything to convey, is not questioned. Nor is the original title of his grantor and of those who conveyed to him denied. But the defendants insist that the title of all those parties was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties.

The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six-sevenths of the tract. That proportion is his if his title be valid.

The widow is the sister of the defendant, Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being

under age, executed to Rodriguez, for money then borrowed, a note for \$4,000, payable a year from date, and bearing interest at the rate of two per cent a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision, that in default of the payment of the interest as stipulated. the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed and the premises sold to satisfy the mortgage debt, and that out of the proceeds of the sale the mortgagee should be authorized to retain. besides his debt and costs, a counsel fee of five per cent upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and encumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent per month. Rodriguez subsequently paid \$1,172 to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and five of the children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about \$10,000. On the 17th of February, 1865, one of the children, who was a minor when this deed was executed, and hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865, the other and seventh child, who had then become of age, executed a like conveyance. consideration paid was \$100.

On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant, George Steele, subsequently became interested in this contract by an arrangement with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term, or within five days thereafter, the lessees might purchase by paying him \$25,000 in gold, and upon such payment being so made he covenanted that he would, by a sufficient deed, release and quitclaim to the lessees or their heirs and assigns free from all encumbrances created by him, all the right and title which he then had to the premises, or which he might thereafter acquire from the United States, or from any of the heirs of José Maria Villavicencia.

The lessees and their assignees insist that they are bona fide purchasers without notice.

This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. Non constat that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no

application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase-money fully paid. The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor.

This contract calls for a quitclaim deed. The result would be the same if such a deed had been executed and full payment made, without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection. This contract may, therefore, be laid out of view. It is no impediment to the assertion of the complainant's rights, whatever they may be. It does not in any wise affect them.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law.

The terms exacted for the loan by Rodriguez were harsh and oppressive. The condition of the widow and orphans might well have touched his kindred heart with sympathy. It seems only to have whetted his avarice. Two per cent a month - and this, if not paid as stipulated, to be compounded - was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment. The alternatives presented were an absolute conveyance of the property, or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt and advances, with the interest superadded, were much less than the value of the property. The note and mortgage were executed by three of the children and the widow: the deed by the widow and five of the children. The other two children conveyed at later periods. The consideration of the conveyance

by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate. Dana, who took the acknowledgment of the deed executed by the widow and five children, testifies that the widow inquired whether the deed contained all the agreements between her and Rodriguez. Dana translated it to her. She complained that the agreements were omitted. Rodriguez insisted that they were in the deed, and added "that they ought not to distrust him, as he was taking all these steps for their interest." The widow and children then executed the deed. Dana, speaking of a subsequent conversation with Rodriguez, on the same day, "which was altogether unsolicited," says: "He stated to me that his object in getting the Villavicencia family to execute the deed aforesaid was to secure his money, money which he had loaned or advanced to them, and save the property for the benefit of his sister and her family, while if it remained in their hands he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by his sister." Rodriguez was examined as a witness. Referring to a period shortly preceding the execution of this deed, he says: "Afterwards I had with them further conversation, and told them, I don't wish to speculate upon you, because you are my relations, and you have treated me well. I can sell the ranch for enough to reimburse myself for my outlays as well as interest, I will return you the surplus money, if any; and, also, if I can sell a portion of the ranch, or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch, but if I have bad luck and cannot sell it, I will lose my money." Elsewhere, in the same deposition, he says: "I stated at the ranch, and again stated to my sister afterwards, that I would return the surplus money, but it was no obligation of mine. It may be that I said so to Charles Dana at that time."

He made the same admissions to other persons who are in no wise connected with this litigation. Their testimony is found in the record. It is unnecessary to extend the limits of this opinion by accumulating and commenting upon it. The widow and five of the children, all who have been examined, testify that they understood the deeds to be only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct. The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six-sevenths of the premises upon paying that proportion of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that represented by the note, and the latter be settled by the terms of the contract and the law of California. The rents, issues, and profits, and improvements made upon the premises must also be taken into the account.

The decree is reversed, and the cause will be remanded to the Cir-

cuit Court with directions to enter a decree and proceed

In conformity to this opinion.

DE MARTIN v. PHELAN.

SUPREME COURT OF CALIFORNIA, 1897.

[115 Cal. 538.]

TEMPLE, J. This appeal is from a judgment upon demurrer to the complaint. The complaint contains averments to the effect that on the fourth day of November, A. D. 1881, plaintiff owned a certain tract of land which was then subject to mortgage liens, then owned by James Phelan. The amount due on said mortgages was \$196,000. The real estate was worth \$390,375. The plaintiff and her thirteen children were in indigent circumstances, destitute of available means of support, in great need, and unable to secure an additional loan upon said land or to sell the same, owing to financial stringency then prevailing, and were wholly dependent upon the charity of others. Said Phelan knew of her distressed condition, and also that her equity of redemption was worth at least \$45,500. Still, designing to take advantage of her distress and necessities, he first offered her \$4,000, and then \$10,000, and finally \$19,000, for her equity of redemption. The offers were successively made on different days, and, in the meantime, said Phelan had her property advertised for sale, under execution, on a decree of foreclosure of said mortgages, and had the sale postponed repeatedly, for the purpose of securing her equity of redemption for a sum greatly disproportionate to its value, by taking an oppressive and unfair advantage of her necessities and distress.

Also that on the fourth day of November, 1881, decedent made her the offer of \$19,000, and threatened to proceed with the sale unless she accepted it. Compelled by her distress and necessities, she finally did accept said offer, and conveyed her equity to him for said sum. She did not know that decedent had taken such advantage, or that he knew of her necessities and distress at that time, but that she discovered such fact on the twenty-seventh day of December, 1887.

It is averred that when defendant falsely represented that he would sell said property, unless she accepted \$19,000 for her equity, decedent did not intend to sell said property, but had in fact determined not to sell the same, unless he was unable to procure plaintiff's interest for \$45,500. He fully intended to offer her \$45,500 for her equity, if he could not procure it for less. This intention was concealed from plaintiff, and decedent knowingly and designedly took advantage of her said necessities and distress.

A great many objections are made to this complaint, but I do not deem it essential to consider any of them, except the general objection that it states no cause of action. That the complaint does not state a cause of action is quite obvious.

The facts constituting the supposed fraud are: 1. Plaintiff was without available means, and in great financial distress; 2. Decedent had obtained a judgment foreclosing mortgage liens upon her land, amounting to \$196,000. Her land was worth much more than this, but owing to a temporary stringency in the money market, she could not borrow more money upon the land or sell it for more than the mortgage debt; 3. Decedent knew that her equity of redemption was worth \$45,500, and was willing to pay her that for it if he could not get it for less, but concealed from her his estimate of its value, and his willingness to pay that sum provided she would not take less; 4. He caused the property to be advertised for sale under the decree, and then caused the sale to be repeatedly postponed; in the meantime making her successive offers for her equity of \$4,000, \$6,000, \$10,000, and \$19,000, which last offer she accepted, in ignorance that deceased would have given her more had she insisted upon it, and induced by her necessities and fears of losing her property in case of a sale under the decree.

It is impossible to believe counsel serious in their contention that it constituted fraud or oppression on the part of Phelan, to conceal from her the fact that he intended to offer her as much as \$45.500 for her equity, if he could not succeed in getting it for less. It would constitute a new departure, both in business and legal ethics. If the obligation to make such disclosures rested upon Phelan, of course the like obligation rested upon the plaintiff to state to Phelan the very least sum her necessities could induce her to accept rather than permit a sale. Negotiations under such conditions would surely be novel.

The real point in the case is, I presume, that the relations between mortgager and mortgagee are in a sense fiduciary, and the mortgagee must obtain no advantage over the mortgagor by the use of the least unfairness or oppression; and it is maintained that it was oppression on the part of Phelan to get the property for an inadequate price, taking advantage of her necessities.

1. In the first place, the relation between the parties was in no sense fiduciary. At common law the mortgagee, at least after con-

dition broken, was the legal owner and could oust the mortgagor. He was really a trustee. Under our system he occupies no such position, and ordinarily has no control over the mortgaged estate. In those cases in which he is, by the mortgage, given some power or control over the estate before foreclosure, the old rule may prevail. There is nothing to show the nature of the mortgages formerly held by Phelan, nor does it now matter. When the wrongs detailed in the complaint were enacted the mortgages had been foreclosed, and Phelan had only his decree. It does not appear that a receiver had been appointed, or that proceedings to that end were threatened.

2. The sale, even after the decree was obtained, was not hastened. The negotiations between the parties were protracted and deliberate. Plaintiff was fully aware of the situation, and knew all the essential facts of the case. The sale was adjourned many times, and successive offers were made to her for her equity. She says she was threatened with a sale under the decree if she did not sell. Of course she knew, without being told, that such sale was inevitable if she did not pay the debt or sell her equity. The financial stringency was not brought on by Phelan. It is not charged that he interfered to prevent her selling to another, or to prevent the obtaining of a loan.

I can discover no element of fraud, oppression, or unfairness in the case.

The judgment is affirmed.

HENSHAW, J., and McFARLAND, J., concurred.

D. Clogging the Equity of Redemption.

JENNINGS v. WARD.

CHANCERY, 1705.

[2 Vern. 520.]

The defendant Ward lends money to Neale, the Groom Porter, to carry on his buildings in Cock and Pye fields, and took a mortgage from him to secure £16,000, with interest at 6 per cent, and in another deed, executed at the same time, took a covenant from Neale, that he should convey to the defendant, if he thought fit, ground rents to the value of £16,000, at the rate of twenty years' purchase. The bill being to redeem, the defendant insisted on that agreement; but the Master of the Rolls decreed a redemption, on payment of principal, interest, and costs, without regard to that agreement; but set aside the same as unconscionable. A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.

RE EDWARDS' ESTATE.

RE EDWARDS' ESTATE.

ESTATES COURT, IRELAND, 1861.

THE question in this case was raised on a motion by the petitioner / to make the conditional order for sale, previously granted by the court, Cause was shown against making the order absolute by P. W. Jackson, a mortgagee on the estate. Jackson grounded his opposition on his deed of mortgage, dated the 3d of May, 1859. This deed contained a proviso that Jackson would not call in the sum secured (£2,500) until two years had elapsed, or twelve months' interest had accrued due; and "that in case one full year's interest on said principal sum of £2,500 shall become due and he unneid at any time during the said period of two years, or in case the said John K. Edwards shall, at the expiration of the said period of two years, be unable to redeem the mortgaged premises, it shall and may be lawful for the said Peter W. Jackson, his executors, administrators, or assigns, if he or they should so elect or prefer, to purchase for his or their own use and benefit; and the said J. K. Edwards doth hereby for himself, his heirs and assigns, promise and agree to sell and absolutely convey, by all necessary deeds and assurances in the law, to the said P. W. Jackson, his heirs and assigns, the part of the mortgaged premises called Old Court, for such sum as, with the sum of £2,500, and interest then due thereon, would make £4,000." Jackson now, relying on this agreement, contended that Edwards was bound to complete the conveyance of Old Court to him.

HARGREAVE, J. I have no doubt that this agreement on the part of Mr. Edwards, to sell the Old Court estate for £4,000, in the event of his not being able to redeem the mortgage on the 4th of December, 1860, is totally void, and ought to be disregarded by a court of equity.

The rule of equity is, that no onerous engagement of any description can be entered into by a mortgagor with his mortgagee on the occasion of the mortgage. I do not doubt that if this contract had been entered into by Mr. Edwards with Mr. Jackson, after the completion of the mortgage transaction, and when Mr. Edwards had got the money in his pocket, it would be perfectly valid; but then the mortgagor would be under no kind of pressure, and he would be able to exercise his unbiassed judgment, as to whether it was a fair contract. But when the contract is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced.

If the land had fallen in value below £4,000, Mr. Jackson would have insisted on being treated as a mortgagee; but, as it has risen, he says he is a purchaser; that is, he gets a collateral benefit over and above his principal and interest, which a court of equity never permits.

This contract is virtually a clause of foreclosure on a fixed day; and

even in England, where foreclosure is possible, it only takes place after a bill has been filed for the purpose, and after the mortgagor has had one or more days fixed for paying the debt. 1

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GLEASON'S ADMINISTRATRIX v. BURKE.

CHANCERY, NEW JERSEY, 1869.

[20 N. J. Eq. 300.]

THE CHANCELLOR. The complainant's intestate, in April, 1862, leased of H. M. Post a lot of land twenty-five feet by one hundred feet, at the southeast corner of Prospect and North First streets, in Jersey City, for the term of fifteen years, with a provision for a renewal for ten years longer. He leased it for the purpose of erecting upon it a building for his business, to front on North First Street. He applied to Burke, with whom he had been in the habit of dealing, for a loan of \$1,500 for that purpose. Burke agreed to advance this loan after he should have expended \$500 on the building. Gleason proposed to secure it by mortgage, but upon applying to Mr. Clark, the counsel of Burke, to arrange the matter, he advised that a mortgage should not be taken, but that for the \$1,500 Gleason should assign the lease; to this Gleason assented, and executed the assignment on June 1, 1862, absolute on its face, reciting the consideration of \$1,500. Before this assignment was made, Gleason had offered to Burke to let him put up a building on twenty-five feet of the rear of the lot without charge, and that he, Gleason, would permit Burke to occupy that part during the whole term, and he would pay the rent, taxes, and assessments for and upon the whole lot, so that it should not cost Burke anything. He alleged as the ground of this offer, that this rear part was of no value to him, and that such a building would bring business to him and add to the value of his premises.

At or shortly after the assignment of the lease, it was agreed that Gleason should pay the \$1,500 by semi-annual instalments of \$125, until the same and all interest on it should be paid; and that upon such payment, Burke should re-assign to Gleason the lot, except the twenty-five feet of the rear, which he should retain for the residue of the term and the renewal; and it was agreed that for the term and its renewal, Gleason should pay all rents, taxes, and assessments on the whole lot. This agreement was made by parol only, but was to be reduced to writing and signed; it was reduced to writing by Mr. Clark, but both parties neglected to sign it. After the assignment of the lease, Gleason finished his house, and Burke advanced the loan as

¹ Accord: Broad v. Selfe, 11 Wkly. Rep. 1036; Tennery v. Nicholson, 87 Ill. 264; Lunnel v. Lyford, 72 Me. 280; Hyndman v. Hyndman, 19 Vt. 9.— Ep.

needed for that purpose. Burke built a house on the twenty-five feet, on which he expended about \$1,800; it was finished in the fall of that year, after Gleason's house was finished; both were being erected at the same time. Burke has since received the rents of the rear building, amounting to about \$1,800, and Gleason and the complainant have paid all rents, taxes, and assessments for the lot. Gleason died in October, 1865, and until his death continued dealing with Burke, who sold him the goods used in his business, on credit.

After the complainant became administratix, she tendered to Burke the balance of the loan and the interest accrued on it, and demanded a re-assignment of the lease. Burke refused to accept the payment or to re-assign the lease, unless he retained the twenty-five feet of the rear of the lot, and complainant would agree to pay all the rents, taxes, and assessments, for the whole lot for the residue of the term; this she refused to do.

Upon this, complainant brought this suit, alleging that the assignment of the lease is a mortgage only, and that she is entitled to redeem the whole premises, and praying for a re-conveyance, upon paying the amount of the loan still unpaid, with interest, and upon paying the amount expended by Burke for the building on the twenty-five feet, above the amount received by him for rents, of both which she prays an account may be taken.

The defendant contends that this was an absolute sale of the lease, with an agreement to convey part of the premises upon payment of \$1,500 and interest.

One may convey lands for a certain price, and agree to re-purchase them at a fixed time, for a certain amount exceeding the price received, and the interest, without the sale being construed a mortgage, or the transaction being affected with usury. But such transactions are suspicious; they are an easy cloak for usury, and their bona fides must be clear, and the court must be satisfied that it was not intended to cover usury, or to take away the right of redemption upon what was, in fact, intended as a mortgage to secure a loan. Courts of equity are very jealous of every device or contrivance intended to take away the right of redemption of what is the security for a loan. And one proof that the formal conveyance was intended as a mortgage only, is that the transaction commenced by negotiations for a loan, and conveying the land as security for the loan. In this case the original agreement was for a loan, and the property was offered by way of mortgage, and the form only was changed at the suggestion of counsel. The transaction must be considered as a mortgage only, and not as a sale and agreement to re-convey part on payment of a fixed sum. Another indication of the transaction being a mortgage, existing in this case is, that Gleason agreed to pay back the principal and interest at fixed times.

In a mortgage, any agreement to pay more than the sum loaned and lawful interest, is usury; so also must an agreement to allow the

lender to retain part of the land mortgaged after being repaid the loan in full, be treated as usurious; and neither will be enforced by courts of law or equity. If this was the whole of this transaction the complainant would be entitled to the full relief sought.

But a borrower and lender may lawfully make other bargains even relating to the mortgaged property, and if they are not in consideration of the loan, or the condition of its being made, and are otherwise lawful, they may be enforced.

If Gleason had not borrowed money of Burke, he might lawfully have given him without consideration the right to occupy part of his lot for the term, on the conditions here agreed upon; and if Burke had erected the building in accordance with the gift, the gift would be valid, and would be enforced in equity. In this case it needed no agreement in writing, the legal title to the land for the term was in Burke by the assignment; and effect can be given to it by limiting the quantity of land to be re-conveyed, in ordering redemption according to the actual agreement between the parties. It is certainly a case in which the gift should be shown by clear proof. But it is sustained by the testimony of Scott and Burke, and the subsequent agreement in conformity with it is proved by Clark, and by the fact that Gleason, in his life, permitted Burke to build, to rent the building, and receive all the rents, while he paid all the ground rent and the taxes and assessments for the whole lot. These facts, and the testimony of Clark, are consistent with the fact that the gift of the twenty-five feet was a usurious premium for the loan. But the evidence of Burke and Scott shows that the gift was made for other reasons, and was not connected with the loan, or a condition of its being made. There is no evidence, and no circumstance to contradict or impeach these witnesses.

The complainant is entitled to a re-conveyance of the seventy-five feet of the north part of the lot, upon being paid the balance of the \$1,500 unpaid with interest, and upon executing an agreement making that part liable for the ground rent, taxes, and assessments on the whole lot, but not for taxes and assessments on the rear building.

UHLFELDER & CO. v. CARTER'S ADM'R.

SUPREME COURT, ALABAMA, 1879.

[64 Ala. 527.]

BILL for an accounting.

BRICKELL, C. J. As the case is presented, it is not necessary to inquire whether the stipulations for the future delivery of the cotton, contained in the mortgages, can be regarded as agreements for

liquidated damages, or in the nature of a penalty, to be compensated, if there is a breach, only by the recovery of actual damages. The whole inquiry is resolved into the question, whether these stipulations are not mere devices to obtain a greater rate of interest, for the forbearance of an existing debt, than is lawful. The facts are, that the mortgagor was indebted to the mortgagees, in a sum stated in the mortgages at eight hundred dollars, but which is shown to have been much less in amount; the balance accruing upon dealings for several years. The mortgagor was a farmer of limited means, known to the mortgagees not to have the ability of raising more than fifteen or twenty bales of cotton in any one year, under the most favorable circumstances, and not of ability to purchase cotton to supply any deficiency between the quantity he could raise and that stipulated to be delivered. The mortgagees were retail merchants, not factors, or brokers, or warehousemen. Into the first mortgage is introduced a stipulation, that the mortgagor shall, on or before the first of the ensuing October, deliver to the mortgagees, for storage and sale, forty bales of cotton; and into the second mortgage a like stipulation is introduced, for the delivery of fifty-four bales of cotton. In the event of a failure to deliver, the mortgagor stipulated to pay, as liquidated damages, one month's storage, and a commission of two and a half per centum on the value of the cotton not delivered.

All contracts, express or implied, for the payment of money, or other thing, or for the peformance of any act or duty, bear interest from the day such money or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed. The lawful rate of interest is eight percentum per annum; and any contract for a higher rate is usurious, and can be enforced for only the principal. Code of 1876, §§ 2088, 2092. Mortgages, like other contracts, may be impeached for usury, and, at law, the same consequences result, as would follow from taking or reserving it in any other form of contract. When, however, it becomes necessary for the mortgagor to resort to a court of equity for relief, in the absence of some peculiar fact or circumstance, the court will not interfere, unless he pays the principal and lawful interest. Relief from the usury is the extent to which he is entitled in good conscience. 1 Story's Eq. § 301; Br. Bank of Mobile v. Strother, 15 Ala. 51; Hunt v. Acre, 28 Ala. 580; Noble v. Walker, 32 Ala. 456; Eslava v. Elmore, 50 Ala. 587.

In determining whether a contract is infected with usury, its substance and effect, not its form, is material. The intent to take or reserve more than lawful interest for a loan of money, or the forbearance of a debt, must exist; and this is deduced from the relations of the parties, their acts contemporaneous with, or subsequent to the contract, and all attendant circumstances. When this intent exists, and such is the substance and effect of the contract, no form of covering which may be given it, no device or shift, can sustain it. A simple

loan, or the mere forbearance of an existing debt, which, with the lawful interest, is not put at hazard, but is certainly to be paid, will become usurious, by engrafting upon it stipulations intended for the additional profit of the creditor, and not as compensation for loss or inconvenience he may bear. Durham v. Day, 13 Johns. 40; Durham v. Gould, 16 Johns. 367.

A commission-merchant, accepting bills, or advancing money for a customer, may contract for the usual reasonable commissions in the course of that business, when the charge is intended as compensation for the risk, trouble, or expense he may incur. Nourse v. Prime, 7 Johns. Ch. 69; Brown v. Harrison, 17 Ala. 774; Swilly v. Lyon, 18 Ala. 552. But such transactions must be closely watched; and in the language of Dargan, C. J., in the case last cited, "If the transaction was a device to evade the statute against usury, then the mere form of the contract could not relieve the party seeking to enforce it from the consequences of usury; for mere device or shift cannot purge the contract, if it be tainted with the intent to take more than lawful interests by way of loan." The intent is the test — was it intended to compensate for risk, trouble, or expense, incurred at the request of the debtor, or was it intended to give the creditor additional profit for the loan of money, or the forbearance of a debt?

There is another class of cases, in which, in the usual course of business, money and individual services are employed, and when the real purpose is to promote the business, parties have been allowed to enter into contracts for the loan or advance of money, or for the forbearance of an existing debt, engrafting upon the contract a stipulation that the debtor shall do some act by which such business will be increased, or, if he makes default, to pay such commissions as could have been earned if he had performed. Of this class of cases is that of Pollard v. Baylor, 6 Munf. 433, to which we are referred by counsel for the appellants; in which it was held, that a commission-merchant, granting indulgences to a debtor, could connect with the contract a stipulation that the debtor should consign him tobacco, to be sold for the payment of the debt, and, if he failed, that he should pay the usual commission for making sales. The case had been previously before the Court of Appeals; and the contract was pronounced usurious, and a deed of trust made for its security void. Pollard v. Baylor, 4 Hen. & In Cockle v. Flack, 93 U.S. (3 Otto), 344, a commissionmerchant advanced a pork-packer \$100,000, at a stipulated interest, to be employed in the purchase of pork, and it was intended the pork should be consigned to him for sale. A stipulation that, if it was not consigned, a fixed commission should be paid the merchant, it was held, did not necessarily render the transaction usurious — that it was a question for the jury, in view of all the facts, to decide whether the stipulation was a mere device to cover usurious interest, or engrafted upon the advance of the money in good faith, to secure in addition to lawful interest the profits incidental to the sale as commission-merchants.

The court said: "It is to be considered that defendants were engaged in a business which was legitimate, and in which both custom and sound principle authorized the joint use of their money and their personal service, increased in value by their integrity and experience. To both these sources they looked for their profits, and they were necessarily limited. It was a necessity of their trade, and it was lawful for them, while loaning their money at a specified rate of interest, to stipulate with parties to whom it was loaned for the incidental advantages of acting as commission-merchants for the sale of the property in which the money was to be invested by the borrower. They had the right, also, to require as a condition of the loan, that it should be invested in such property as would require their services in selling and handling it. . . . We see no reason why the parties could not go a step further, and stipulate that if, for any reason operating in the interest of the borrower, he should prefer to become his own broker or commission-merchant, or to sell at home, he should pay the commission which the other had a right to contract for and recover. . . . While it was possible to make such a transaction a mere cover for usury, it was at the same time possible that the contract was a fair one in aid of defendants' business - a business in which they were actually and largely engaged, and in which lending was the mere incident, and not the main pursuit." A similar transaction was supported in Matthews v. Coe, 70 N. Y. 230; s. c. 26 Am. 583. See also Grubbs v. Brooks, 47 Penn. 485; Suydam v. Westfall, 4 Hill N. Y. 211.

The manifest distinction between these cases and the present is, that the creditors in making the loans, or in the forbearance of the present debt, added only a stipulation which would promote the business in which they were engaged, and which was usual in the course of such business. The loans or advances were to be invested in the purchase of the property, for the consignment of which they stipulated, or the property was to be sold and applied to the payment of the existing debt. In all of them, performance of the contract was stipulated, and the ability of the debtor to keep and perform was not questioned or doubted. Here, performance of the stipulation for the delivery of the cotton was not, and could not have been, contemplated. The inability of the mortgagor to perform was known to the mortgagees, and the payment of the stipulated damages it was intended and expected they would receive, without ever being subjected to the labor, expense, and loss of time, which would have been incident to the storage and sale of the cotton, if it had been delivered. Nor was the storage and sale of cotton upon commission, the business in which they were engaged, and for the increase of which, it is fair to presume, they would employ their capital, whether it was in the form of existing debts, or of money in hand. When an agreement for a loan or advance of money, or the forbearance of a debt, is part of an entire contract, whether usury is intended is, in all cases, a question of fact. Smith v. Marion, 27 N.Y. 137. When the entire contract indicates that any one of its stipulations

must operate to yield the creditor a profit for the loan or forbearance, and not compensation for loss or inconvenience, or for services rendered, or which it was contemplated he would render, it must be pronounced usurious. The mortgagees in the light of the facts, were, under the guise of a stipulation for the future delivery of cotton for storage and sale, but stipulating for the payment, in addition to lawful interest on the debt due them, of the additional profit of the usual charges for storage, and the commission on the sales. It not being contemplated that the cotton would be delivered, they could as well have stipulated for the payment of the precise sum of money to which the storage and commissions will amount, in addition to the lawful interest. All agreements of this kind must be zealously watched, or the statutes against usury will be nullified.

We are of the opinion there is no error in the record, and the

decree will be affirmed.1

SANTLEY v. WILDE.

COURT OF APPEAL, 1899.

[1899 2 Ch. 474.]

LINDLEY, M. R. The question raised on this appeal is extremely important: I do not profess to be able to decide it on any principle which will be in harmony with all the cases; but it appears to me that the true principle running through them is not very difficult to discover. and I think that it can be applied so as to do justice in this case and in all other cases on the subject that may arise. The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt of outgation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage"; but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule. See 1 Powell on Mortgages, 6th ed. pp. 116 et seq.: Title, "How a Mortgage is considered in Equity." The right to redeem is not a personal right, but an equitable estate or interest in the property mortgaged. A "clog" or

¹ Compare: Tholen v. Duffy, 7 Kan. 405; Dailey v. Maitland, 88 Pa. St. 384. — ED.

"fetter" is something which is inconsistent with the idea of "security": a clog or fetter is in the nature of a repugnant condition. If I convey land in fee subject to a condition forbidding alienation, that is a repugnant condition. If I give a mortgage on a condition that I shall not redeem, that is a repugnant condition. The courts of equity have fought for years to maintain the doctrine that a security is redeemable. But when and under what circumstances? On the performance of the obligation for which it was given. If the obligation is the payment of a debt, the security is redeemable on the payment of that debt. That, in my opinion, is the true principle applicable to the cases, and that is what is meant when it is said there must not be any clog or fetter on the equity of redemption. If so, this mortgage has no clog or fetter at all. Of course, the debt or obligation may be impeachable for fraud, oppression, or over-reaching: there the obligation is tainted to that extent and is invalid. But, putting such cases out of the question, when you get a security for a debt or obligation, that security can be redeemed the moment the debt or obligation is paid or performed, but on no other terms.

Now, let us see what the contract here is. It is not suggested that there has been fraud or undue influence or over-reaching or hard bargaining. Here is a lady who has a lease, of which there are ten years to run, subject to a rent and covenants. She wants to carry on a theatre, and she wants to borrow a sum of £2,000 for the purpose. What is the security she offers? The security of the lease is probably absolutely insufficient. A security of that sort, unless it is kept up for the ten years, is very shaky. The lender took that view. He says, "I will lend you the money, and you may have five years in which to pay it; and you shall pay me a sum equal to one-third part of the net profit rents to be derived from any underleases." What is the lender's position? It is obvious that his security depends not only on the solvency of the lady, but also on the success of the theatre. This is the kind of security proposed, and the lender says he will lend upon that. Accordingly the £2,000 is lent, and the mortgagor by her security covenants to repay the money by instalments; the deed then further goes on as follows: [His Lordship read the second testatum and covenant by the mortgagor for payment to the mortgagee of one-third of the net profit rents to be derived from any underleases or undertenancies, and also the proviso for redemption; and continued: -]

That means that this lease is granted or assigned by the mortgagor to the mortgagee as security not only for the payment of the £2,000 and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principle which I have laid down, that does not clog the right of redemption upon the performance of the obligation for which the security was given. That is the nature of the transaction, and the good sense of it.

But it is said that is not good law. Those, however, who say so lose sight of the true principle underlying the expression that there must be

no clog or fetter on the equity of redemption. The plaintiff says, "I will pay off the balance of the £2,000 and interest, and you will give me back the lease, and this is the end of my obligation." But the mortgagee says, "No; that is not the bargain: you cannot redeem on those terms. On the contrary, you may pay me the £2,000 and interest, but if you do, you must also pay the one-third profit rents." On principle that is right: it follows from what I have said. That is the bargain, and there has been no oppression, and there is no reasonable legal ground for relieving this lady. As to the obligation or right to pay off this unpaid balance of the £2,000, the defendant has, by calling it in, given the plaintiff the right she would not otherwise have had. If she chooses to redeem, and to pay off the rest of her £2,000, she can do so. Possibly she does not wish to pay it off unless she gets rid of the whole thing. The result is that the notice of appeal is substantially right, but the order should be prefaced thus: The plaintiff not desiring to pay off . the £2,000 and interest, dismiss the action with costs; but on the counter-claim declare that the defendant is entitled to hold the mortgage during the residue of the term, notwithstanding all principal and interest has been paid, as a security for "a sum equal to one-third part of the clear net profit rents," and so on, following the language of the security. Then there must be an account of what is due on the security from the plaintiff to the defendant. As to the costs of the appeal, the defendant is entitled to them.1

NOAKES & CO., LTD., v. RICE.

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House of Lords, 1902.

[1902 A. C. 24.2]

The respondent, a licensed victualler, in 1897 bought a public-house held under a lease expiring in 1923. Before the purchase the appellants, who were brewers, had a mortgage on the house with a covenant similar to the one now in question. The appellants released their security to enable the second mortgagees to sell the house. The respondent not being able to find all the purchase-money, part was advanced by the appellants upon a mortgage by the respondent of the leasehold premises, good-will, &c., subject to a proviso that if the respondent should pay all the moneys and interest due on the security the appellants should surrender or re-convey the premises to the respondent or as he should direct. In the mortgage deed the respond-

¹ Compare: Biggs v. Hoddinott, 1898 2 Ch. 307; Brown v. Ryan, 1901 2 Ir. Rep. 653. — Ed.
2 Only one opinion is printed. — Ed.

ent covenanted, in the terms more fully set forth in both the reports below, [1900] Ch. 213; [1900] 2 Ch. 445; to the effect that, so as to charge the premises into whosesoever possession they might come, and to the intent that the obligation of the covenant might run with the land, the respondent would not at any time during the continuance of the term, whether any money should or should not be owing on the security, use or sell upon the premises any malt liquors except such as should be purchased by the respondent of the appellants.

The respondent being desirous to pay off all money due on the security and to obtain a reconveyance or transfer, with a release from the covenant in question, brought an action against the appellants, claiming a declaration to that effect.

Cozens-Hardy, J., made an order declaring that upon payment by the respondent to the appellants of all moneys due, the respondent was entitled to a reconveyance of the property together with a release of all covenants contained in the mortgage, or at his option to have the property transferred to a transferee with the benefit of all covenants contained in the mortgage; and that in either case the appellants were not thereafter entitled to the benefit of the covenant in question. This order was affirmed by the Court of Appeal (LORD ALVERSTONE, M. R., RIGBY, and COLLINS, L.JJ.).

LORD DAVEY. My Lords, there are three doctrines of the courts of equity in this country which have been referred to in the course of the argument in this case. The first doctrine to which I refer is expressed in the maxim, "Once a mortgage always a mortgage." The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void.

My Lords, the first maxim presents no difficulty: it is only another way of saying that a mortgage cannot be made irredeemable, and that a provision to that effect is void. In the case of the Marquis of Northampton v. Salt, [1892] A. C. 1, the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed.

My Lords, the second doctrine to which I refer, namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract, was established long ago when the usury laws were in force. The Court of Equity went beyond the usury laws, and set its face against every transaction which tended to usury. It therefore declared void every stipulation by a mortgagee for a collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest. I think it will be found that every case under this head of equity was decided either on this ground, or on the ground that the bargain was oppressive and unconscionable. The

abolition of the usury laws has made an alteration in the view the court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable, according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think the case of Biggs v. Hoddinott, [1898] 2 Ch. 307, in the Court of Appeal was rightly decided.

The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: Once a mortgage always a mortgage, and nothing but a mortgage. The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his more concerns the conquion in which he parted with it. I do not dissent from the opinion expressed by my noble and learned friend opposite (Lord Lindley), when Master of the Rolls, in the case of Santley v. Wilde, [1899] 2 Ch. 474. He says: "A clog or fetter is something which is inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition." But I ask, "security" for I think it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage: first, security for the money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. I confess I should have decided the case of Santley v. Wilde, supra, differently from the way in which it was dealt with in the Court of Appeal. After the payment of principal and interest, and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits. and the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem. The principle is this that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan. In my opinion, every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest. and no more payable after the principal is paid off than interest would I apprehend a man could not stimulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption.

By the Conveyancing Act a mortgagee may now be required to transfer his mortgage on payment of what is due to him, and he must then transfer all his security, including every advantage which he derives from the mortgage transaction, and all his deeds and documents constituting his title as mortgagee. And on redemption he must do the like to the mortgagor, and any stipulation which varies the effect and incidents of redemption on payment off of what is due on the loan is a clog within the meaning of the rule.

Now, applying what I have said to the present case, the decision becomes easy. In the first place, I do not think that the respondent's covenant to deal exclusively with the brewers continued after the payment off of the loan and the redemption; and, secondly, if it did, it was an attempt to charge it on the property, and that constituted a clog or fetter which, according to well-established principles, was void.

My Lords, I only desire to add that, with my noble and learned friend by my side (LORD MACNAGHTEN), I cannot assent altogether to the assumption made by Cozens-Hardy, J., that the covenant constituted or might constitute a good charge upon the property by virtue of the operation of the doctrine in Tulk v. Moxhay (1848), 2 Ph. 774. I should hesitate some time before I assented to that proposition; but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge on the property would render it void.

My Lords, upon these grounds I agree with the motion proposed by my noble and learned friend.

BRADLEY v. CARRITT.

House of Lords, 1903.

[1903 A. C. 253.¹]

WILLIAM M. BRADLEY holding most of the shares in a tea company by a written agreement of May, 1892, agreed in consideration of a loan from the respondent to transfer his shares to the respondent as security; and by the fourth clause he made the agreement stated in the head-note. [A holder of shares in a tea company mortgaged the shares to secure a loan and agreed to use his best endeavors to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker, and in the event of any of the company's teas being sold otherwise than through the mortgagee to pay him the amount of the commission he would have earned if the

¹ Only one opinion is printed. - ED.

teas had been sold through him.] The terms of the agreement are set out verbatim in the report below, [1901] 2 K. B. 554-5, and are closely analyzed in the judgment of LORD LINDLEY. James Bradley, brother to William, signed an agreement containing a similar clause. The loan was made to William; the mortgage was eventually paid off and the company afterwards changed its broker. The respondent brought an action against William and James Bradley jointly for breach of their respective agreements. The action was tried by BIGHAM, J., with a jury, who found a verdict for the plaintiff for £750 damages, and judgment was entered accordingly. The Court of Appeal (A. L. SMITH, M. R., VAUGHAN, WILLIAMS and STIRLING, L.JJ.) affirmed this judgment, [1901] 2 K. B. 550.

May 11. Lord Machaehten. My Lords, this appeal raises in a slightly different form and with some difference of circumstance the question which this House had to consider in the recent case of Noakes v. Rice, [1902] A. C. 24. Your Lordships, I think, have nothing to do now but to determine whether the distinction between the present case and the case of Noakes v. Rice, as finally decided, is or is not a solid and substantial difference leading to a different result. Other points, no doubt, were discussed at the bar, but the only effect of the discussion was to encumber and embarrass the argument on the one point which was really arguable. In my view, all these other points were and are immaterial, and I pass them by altogether.

The distinction between Noakes v. Rice and the case under review is brought out very clearly in the judgment of the Court of Appeal, which was delivered by Stirling, L. J. It is, I need not say, a most careful judgment, to which little or nothing could be added by the learned counsel for the respondent. But if I am not mistaken, it shows some trace of the difficulties created by recent decisions and dicta in the Court of Appeal. And certainly it is only fair to bear in mind that at the time when it was delivered the case of Noakes v. Rice had not gone beyond the Court of Appeal, while the principles re-established or definitely asserted by this House in Noakes v. Rice had been shaken and obscured by the decision of the Court of Appeal in Santley v. Wilde, [1899] 2 Ch. 474. I am aware that my noble and learned friend Lord Lindley, from whom I should never differ without the greatest hesitation and misgiving, still holds that Santley v. Wilde was rightly decided. My noble and learned friend will, I am sure, pardon me for saying that I am unable to concur in that view. I think the method of the judgment questionable, and the effect subversive of a settled doctrine of equity. Santley v. Wilde was the case of a mortgage to secure an advance of money. The loan was the occasion of the mortgage. The end and purpose of the mortgage was to secure the loan; and but for one stipulation in the mortgage deed the transaction would have been a matter of every-day occurrence. The mortgagee stipulated, of course, for repayment of principal, and for payment of interest properly so called;

and by way of further remuneration for the accommodation afforded he stipulated for a share of the profits to be derived from the use of the mortgaged property, which happened to be a theatre held under lease for a term of years. Now that the usury laws have been repealed there cannot, I think, be any objection to such a stipulation, provided it comes to an end when the mortgagee is paid principal, interest, and costs. But in Santley v. Wilde the stipulation was that the mortgagee should receive his share of profits after the mortgage was paid off, during the continuance of the mortgagor's interest in the property, for the whole term of the lease. That stipulation was, as it seems to me, unquestionably part of the mortgage transaction. Well, the mortgagee calls in the loan. The mortgagor tenders principal, interest, share of profits up to date, and costs, and demands a reassignment. This demand is refused; and then he brings an action for redemption. Reversing Byrne, J., the Court of Appeal held that the mortgagor was not entitled to redeem. The way by which the court arrived at that conclusion was this: "A mortgage," said the Master of the Rolls, "is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given." I cannot help thinking that the double aspect which this definition apparently presents may have had something to do with the result. For the Court of Appeal proceeded to split up the mortgage transaction into two parts - a security for payment of the debt, and a security for the discharge of an additional obligation. They say in effect: "The mortgagor may pay off the debt if he likes, but that will not discharge the mortgage. The mortgage will remain as a security for the performance of the obligation relating to the share of profits. As long as that obligation lasts the mortgage stands." The result, therefore, was, to use the words of Cozens-Hardy, J., that "the proviso for redemption was nugatory," because it only came into operation when there was "nothing on which it could operate." That seems to me to be a very far-reaching decision. It reduces the rule that a mortgage cannot be made irredeemable to a dead letter. You have only to tack on some stipulation, such as men of business might well agree to if there were no mortgage, and the thing is done. In Noakes v. Rice the mortgagee suffered, it would seem, merely because his legal advisers had the misfortune to know a little law, and had not learned the secret of Santley v. Wilde. They thought they could make the covenant on which they meant to rely run with the land. If they had not puzzled over a matter which is often one of some difficulty, if they had only inserted a covenant to the effect that the mortgagor and his assigns should get their beer from the mortgagee, and from no one else, so long as the lease lasted, and if the proviso for redemption had been so expressed as to cover that obligation, the mortgage, according to Santley v. Wilde, would have been irredeemable, and the covenant open to no objection.

Now, what was the Court of Appeal to do when it was confronted

by the decision in Santley v. Wilde, and at the same time warned by what was said in Biggs v. Hoddinott, [1898] 2 Ch. 307, that judges were not to go one step beyond what had been actually decided? I must say I think the court took the only course open to it.

In the first place, it is observed in the judgment of the Court of Appeal that it has never been laid down that it is essential for the validity of what are called, not very happily, I think, collateral stipulations, that they should cease to operate on redemption. That is perfectly true. But it may be said with equal truth that, putting aside the case of Santley v. Wilde, there is no case to be found in the books from the earliest times to the present day in which a mortgagee after redemption ever attempted to keep on foot the benefit of any collateral stipulation which was part and parcel of the mortgage transaction. And that surely is far more significant. You could hardly expect to find in any judicial utterance a note of warning against an experiment which before Santley v. Wilde no one ever thought of trying. Then it is to be observed that it was the view of Cozens-Hardy, J., and the Court of Appeal in Noakes v. Rice that the covenant in question in that case imposed an actual burden on the land which was the subject of the mortgage. "The covenant," said Collins, L. J., "imposes a tie upon the house, not a personal restriction upon the mortgagor." Giving great weight to this circumstance, and intending, no doubt, to keep strictly within the line of decided cases, the learned judges of the Court of Appeal came to the conclusion that a direct fetter on the equity of redemption, such as that which was supposed to exist in Noakes v. Rice, was not permissible, but that a fetter, or restriction operating indirectly, though it might have the same effect, was not open to objection, and, indeed, was sanctioned by principles said to have been laid down in Biggs v. Hoddinott.

The real question is whether this distinction can be supported. It is necessary, I think, to examine closely the reasoning on which the conclusion of the learned judges of the Court of Appeal was based. At the outset they were met by a passage in a former judgment of Rigby, L. J.: "'The property,' said Rigby, L. J., in Noakes v. Rice, [1900] 2 Ch. 445, at p. 457, 'which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not, either expressly or by implication, reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force." That, my Lords, was very much what was said in this House, when the case was before your Lordships; and it is quite right so far as it goes. To that expression of opinion exception was taken. The words "by implication" are explained away by saying, "It is an expression which we consider to have been used by Rigby, L. J., with reference to a class of cases in which the obligation takes the form of a penal sum or liquidated damages by way of penalty on the doing of a particular thing." My Lords, I am not quite sure that I understand the

force or application of that observation. Then the judgment goes on to observe: "It is said, however, that the shares, after redemption, are fettered, inasmuch as the stipulations into which the mortgagor had entered will prevent him from dealing so freely with his property as he otherwise would." And then follow these important words: "It is quite possible that an indirect effect of this nature may flow from these stipulations, but the same result would have followed if the stipulations had been entered into on the occasion of an advance being made by the plaintiff to the defendant W. M. Bradley on his personal security; and in that case the stipulation would, as it seems to us, be perfectly valid." My Lords, there again I have some difficulty in following the reasoning of the Court of Appeal. I should not have supposed that any one would contend that the peculiar doctrines of equity applicable to mortgage transactions apply in all cases, whether there is a mortgage or not, and I rather doubt whether the circumstance that a stipulation is valid when it is not part of a mortgage transaction is an argument for its validity when it is.

The judgment concludes by repeating what was said at the outset: "There is no decision that such indirect effect of the stipulations brings them within the doctrine of equity under consideration, and so to hold would," it adds, "reduce the operation of the decision in Biggs v. Hoddinott within very narrow limits. For these reasons we think that the equity of redemption ought not in the present case to be held clogged."

My Lords, I have stated, in the words of their judgment, the reasons which induced the learned judges of the Court of Appeal to decide against the present appellants. I doubt whether those reasons can be regarded as altogether satisfactory. As to the last reason, I must say, speaking for myself, that I am not sure that it would be a great misfortune if the operation of every decision were to be confined to the matter decided and the principles on which the decision rests. Harm, I think, is sometimes done by general expressions, even in praise of a principle which everybody admires in the abstract, when they are not necessary for the purpose in hand. Though true in themselves, they are apt to be misunderstood owing to the connection in which they are found. One learned judge thought Santley v. Wilde was covered by Biggs v. Hoddinott, though the actual decision in Biggs v. Hoddinot does not, I think, touch the point raised in Santley v. Wilde. Biggs v. Hoddinott was a plain case. It purported to decide two things. In the first place, it purported to decide that a mortgage may be made irredeemable for a reasonable period. Well, everybody knows that when money was placed out on mortgage as an investment nothing was more common than to make the mortgage irredeemable for a certain limited time. It was an old and well-established practice, and a very reasonable practice too. I do not understand that in the case of Teevan v. Smith (1882), 20 Ch. D. 724, 729, Sir George Jessel, M. R., treated the point as open to any possible doubt. He referred

to it, I think, as a practice well understood and perfectly valid. The other matter which Biggs v. Hoddinott purported to decide was that a stipulation for additional remuneration during the continuance of the mortgage was valid. That, again, was a matter which was hardly open to question after the repeal of the usury laws. As my noble and learned friend Lord Davey pointed out in Noakes v. Rice, the additional remuneration is only interest in another form. Such a stipulation does not prevent the mortgagor getting back his property or impede or obstruct redemption.

My Lords, it seems to me to be playing with words to say that on redemption these shares came back to Mr. Bradley no worse than they were when he mortgaged them. If I part with property owing to a temporary necessity and the property is returned to me afterwards, do I get it back just as it was when it comes enveloped in an atmosphere of danger which was not present when I parted with it? Is it none the worse? Is its usefulness to me unimpaired if it now requires delicate handling and cautious treatment to prevent its becoming a source of mischief to its owner? Mr. Bradley could not have safely sold or mortgaged any of these shares when he got them back. True, their value to a purchaser or a mortgagee would be just the same. But what would have been Mr. Bradley's position? We were told, and it seems to stand to reason, that the only market for shares of this description is to be found among tea brokers. Tea brokers want to get hold of shares in a tea company in order to have the sale of the company's teas. That means or points to the displacement of the acting broker. A change of brokers in Mr. Bradley's company would, if the respondent be right, necessarily expose Mr. Bradley to a heavy liability. The Court of Appeal, says that is not enough: the mortgagee has not retained any direct hold upon the shares, though he may have indirectly brought about the same result. My Lords, I do not think it is necessary that there should be any hold upon the property, direct or indirect. I think, as I ventured to say in Noakes v. Rice, that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. And I think your Lordships gave sanction to that proposition when you approved the decision in the Irish case of Browne v. Ryan, [1901] 2 I. R. 653. Can you impose on the equity of redemption a fetter operating indirectly, when you cannot, as it is admitted, impose a fetter which operates directly? My Lords, I should have thought that that question answered itself - you cannot do indirectly that which you must not do directly.

The result, therefore, in my opinion, is that the judgment of the Court of Appeal cannot be maintained, and the action must fail so far as regards Mr. W. M. Bradley. It fails too, I think, as regards Mr. James Bradley. His liability, in my opinion, was only secondary to his brother's liability. When Mr. Carritt, by his own act in calling in the loan, put an end to the liability of Mr. W. M. Bradley, the liability of Mr. James Bradley fell with it.

For the reasons I have given I move your Lordships that the appeal be allowed and the action dismissed, and that the respondent do pay the costs both here and below.

BIGGS v. HODDINOTT.

COURT OF APPEAL, ENGLAND, 1898.

[1898. 2 Ch. D. 307.]

[A MORTGAGE of an hotel by defendant Hoddinott to plaintiff Biggs, a brewer, to run five years contained a covenant by the mortgages that during the continuance of the security they would deal exclusively with the mortgage for all beer and malt liquor sold on the mortgaged premises. The mortgagors having ceased to purchase beer of the mortgagee, he moved now for an injunction. This was granted by ROMER, J., from whose decision this appeal was taken.]

LINDLEY, M. R. We have listened to a very ingenious and learned argument with the view of inducing us under pressure to lay down a proposition of law which would be very unfortunate for business men. The proposition contended for comes to this — that while two people are engaged in a mortgage transaction they cannot enter into any other transaction with each other which can possibly benefit the mortgagee, and that any such transaction must be before or after the mortgage, and be independent of it, so that it cannot be said that the mortgagee got any additional benefit from the mortgage transaction. Mr. Farwell did not attempt to uphold this on any rational principle, but relied on authority. Of course, we must follow settled authorities whether we like them or not. But do they support this proposition? Jennings v. Ward, 2 Vern. 520, was the first case relied upon. That was a redemption suit, and the stipulation which was in question seriously interfered with the redemption of the mortgaged property, and the Master of the Rolls (Sir J. Trevor) decreed redemption without regard to that stipulation. He is reported to have said: "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." That has been understood as meaning exactly what was said, without regard to the circumstances of the case, and has found its way into the text-books as establishing that a mortgagee cannot have principal, interest, and costs, and also some collateral advantage. But that supposed rule has been departed from again and again. Take the case of West India mortgages: it has been repeatedly decided that the mortgagee, if not in possession, may stipulate that he shall be appointed consignee. The proposition stated in Jennings v. Ward, 2 Vern. 520, is too wide. If properly guarded it is good law and good sense. A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest,

and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case where collateral advantages have been disallowed which does not come under one of these two heads. To say that to require such a covenant as that now in question is unconscionable is asking us to lay down a proposition which would shock any business man, and we are not driven to it by authority. The proposition laid down by Hargreave, J., in In re Edwards's Estate, 11 Ir. Ch. Rep. 367, that where an onerous contract entered into by a mortgagor with his mortgagee is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced, goes too far, though the decision of the learned judge was correct; for the stipulation with which he had to deal was unreasonable, and one which ought not to be enforced. The appeal will be dismissed.

CHITTY, L. J. The mortgage here is a mortgage of a public-house for a time certain by publicans to a brewer, affected in the usual way, and it contains a covenant by the mortgagors during the continuance of the security to take all their beer from the mortgagee, and a covenant by the mortgagee to supply it. It is contended that the covenant by the mortgagors is void in equity. The first objection I have to make is that it in no way affects the equity of redemption, for it is not stipulated that damages for breach of the covenant shall be covered by the security, and redemption takes place quite independently of the covenant; so this is not a case where the right to redeem is affected. Equity has always looked upon a mortgage as only a security for money, and here the right of the mortgagors to redeem on payment of principal, interest, and cost is maintained. It has been contended that the principle is established by the authorities that a mortgagee shall not stipulate for any collateral advantage to himself. I think the cases only establish that the mortgagee shall not impose on the mortgagor an unconscionable or oppressive bargain. The present appears to me to be a reasonable trade bargain between two business men who enter into it with their eyes open, and it would be a fanciful doctrine of equity that would set it aside.

As regards the authorities, Jennings v. Ward, 2 Vern. 520, was relied on. That was a redemption suit, and the Master of the Rolls decreed redemption without regard to a certain agreement which he considered unconscionable and set aside as being "unreasonable," as appears from the registrar's book, which we have now in Court: Reg. Lib. 1705, fol. 495. The statement by Hargreave, J., in In re Edwards's Estate, 11 Ir. Ch. Rep. 367, that a mortgagor is considered to be under pressure is not a universal principle. The first great departure from any such principle is found in West India mortgages, where a mortgagee is allowed to be consignee if not in possession. It was found that the supposed rule to the contrary founded on the dicta, not the decisions, of judges, would not work, for that mortgagors

could not obtain money except on these terms. Potter v. Edwards, 26 L. J. (Ch.) 468, is a clear authority the same way. There it is said that the money was paid and partly repaid as commission; but that is a fiction. The plain transaction was that the mortgagor agreed to receive £700 and give a mortgage for £1,000. Mainland v. Upjohn, 41 Ch. D. 126, is another illustration. The decision of Hargreave, J., in In re Edwards's Estate, 11 Ir. Ch. Rep. 367, was right, for in that case there was an unconscionable bargain, and a direct clog on the right to redeem. It is unnecessary to say more: the covenant in this case is not avoided by any such supposed rule of equity as has been contended for.

Collins, L. J. I am of the same opinion. Apart from authority, no one would say that this stipulation was invalid, for it seems a reasonable and businesslike one. But it is said that mortgages are subject to a long series of decisions, and no doubt equity judges have tried to lay down some principle which would explain satisfactorily the decisions of their predecessors and account for their own, but in so doing they have sometimes laid down principles which, when applied to other cases, are too wide. The fact is that those decisions were given in particular hard cases, and judges have afterwards endeavored not always successfully to reduce them to a general rule. The only safe thing is to see how far the decisions have gone. It is clear that a mortgage in the view of a Court of Equity is simply a loan on security, and nothing inconsistent with that can be imported into the deed, and Hargreave, J., in In re Edwards's Estate, 11 Ir. Ch. Rep. 367, probably had in his mind the principle that provisions inconsistent with the nature of a mortgage are illegal. But the principle which he laid down, that no onerous engagement of any description can be entered into by a mortgagor with his mortgagee on the occasion of the mortgage, was not necessary for the decision of the case before him, for the stipulation there was one which interfered with the right of redemption onpayment of principal, interest, and costs.

On what principle can any stipulation in a mortgage deed which does not fetter the right of redemption be held invalid? I think only on the general principle that effect will not be given to what is unconscientious and oppressive. No narrower principle will work. Here the provision is reasonable and does not fetter the equity of redemption. The wide proposition in Jennings v. Ward, 2 Vern. 520, was not necessary for the decision in that case, and there is nothing in this case to bring it within that decision. The mere fact that a stipulation for the benefit of the mortgagee is contained in the mortgage deed does not necessarily make that stipulation invalid.

SAMUEL v. JARRAH TIMBER CORPORATION.

House of Lords, 1904.

[1904. A. C. 323.]

THE following statement of the facts is taken from LORD MACNAGHTEN'S judgment:

By letter dated June 11, 1901, the appellant Henry Samuel offered to advance to the respondent company £5,000 at 6 per cent upon the security of £30,000 first mortgage debenture stock of the company, subject to his having "the option to purchase the whole or any part of such stock at 40 per cent at any time within twelve months." Other conditions were attached to the offer, but they are not material for the purpose of the present question. Then followed this provision: "The advance to become due and payable with interest at thirty days' notice on either side."

The offer was accepted by the company. The stock was duly created and registered in Mr. Samuel's name.

Within the period of twelve months, and before the company gave notice of intention to repay the advance, Mr. Samuel claimed to purchase the whole of the mortgaged stock at the agreed price. Thereupon the company brought this action, asking for redemption and a declaration that the option was illegal and void.

Kekewich, J., gave judgment for the company, which was affirmed by the Court of Appeal.

Earl of Halsbury, L. C. (read by Lord Macnaghten). My Lords, I regret that the state of the authorities leaves me no alternative other than to affirm the judgment of Kekewich, J., and the Court of Appeal. A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

LOBD MACNAGHTEN. My Lords, both Kekewich, J., and the Court of Appeal decided in favor of the company. Having regard to the state of the authorities binding on the Court of Appeal if not on this House, it seems to me that they could not have come to any other conclusion, although the transaction was a fair bargain between men of business without any trace or suspicion of oppression, surprise, or circumvention.

It is, I think, unnecessary to consider what the true construction of the agreement between Mr. Samuel and the company may be. The result would have been precisely the same if the agreement had in terms declared that the option was not to continue after repayment. The law undoubtedly is that a condition such as that in question, if legal and binding at all, must come to an end on repayment of the loan.

In the Court of Appeal the question was treated as governed by the principle, of which Noakes v. Rice, [1902] A. C. 24, is a recent example, that on redemption the mortgagor is entitled to have the thing mortgaged restored to him unaffected by any condition or stipulation which formed part of the mortgage transaction.

That principle, I think, is perfectly sound. But, in my opinion, the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

This latter rule, I think, is founded on sentiment rather than on principle. It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed landowners from imposition and oppression. And it was invented, I should suppose, in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult. I gather from some general observations made by Lord Hardwicke in Mellor v. Lees (1742), 2 Atk. 494, that he would have been disposed to confine the rule to cases in which the Court finds or suspects "a design to wrest the estate fraudulently out of the hands of the mortgagor," and to cases of "common mortgage"—that is, as I understand it, mortgage of land by deed. It will be observed that in the later case of Toomes v. Conset (1745), 3 Atk. 261, which is often referred to for a statement of the rule, his Lordship speaks only of "a deed of mortgage;" an instrument which perhaps rather lends itself to imposition - for no one, I am sure, by the light of nature ever understood an English mortgage of real estate.

In Vernon v. Bethell (1761), 2 Eden, 113, however, Northington, L. C. (then Lord Henley), laid down the law broadly in the following terms: "This Court, as a Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them."

This doctrine, described by Lord Henley as an established rule nearly 150 years ago, has never, so far as I can discover, been departed from since or questioned in any reported case. It is, I believe, universally accepted by text-writers of authority. Speaking for myself, I should not be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial

assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty money-lender. At the same time I quite feel the difficulty of interfering with any rule that has prevailed so long, and I am not prepared to differ from the conclusion at which the Court of Appeal has arrived.

I am therefore of opinion that the appeal must be dismissed with costs, and I move your Lordships accordingly.

LORD LINDLEY. My Lords, the letter of June 11, 1901, written by the defendant to the plaintiff company, contained an offer of a loan of £5.000 to the company upon certain terms, and this offer and the terms proposed were accepted by the company by their letter in answer, dated June 14, 1901. These two letters constituted an agreement between the parties. The main provisions are as follows, namely: 1. That the defendant should forthwith lend the company £5,000 at 6 per cent, redeemable on thirty days' notice by either party. 2. That the defendant should have as security £30,000 of the company's first mortgage debenture stock transferred to him. 3. That the directors of the company should elect a nominee of his on their board. 4. That the defendant should have the option of purchasing the whole or any part of such stock at 40 per cent at any time within twelve months. 5. That he should have a further option, namely, in the event of the company at any time raising further capital or selling its undertaking for shares or stocks of another company, the defendant should have the option of underwriting the taking up of such new capital, or shares, or stocks at a commission of 10 per cent.

The first question is, What is the true nature of this agreement? Is it a mortgage with an option to purchase, or is it a conditional sale? Or is it an agreement giving Samuel an option to hold the debenture stock as a mortgage or a purchase? It appears to me to be clearly a mortgage with an option to purchase. A loan of £5,000 on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the £5,000 was advanced and the debenture stock was placed at Samuel's disposal he was in the position of mortgagee of that stock. He had the rights of a mortgagee, and the company had the rights of a mortgagor. There was that reciprocity and mutuality of remedies which distinguish a mortgage transaction from a conditional sale, and from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was in my opinion a mortgage, plus, amongst other things, an option to purchase, which if exercised by the mortgagee would put an end to the mortgagor's right to redeem - i. e., would prevent him from getting back his mortgaged property. This was the view taken by Kekewich, J., and by all the members of the Court of Appeal, and I am unable myself to view the transaction differently.

In Lisle v. Reeve, [1902] 1 Ch. 53, at p. 68, Buckley, J., suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his

decision was affirmed first by the Court of Appeal and afterwards by this House (Reeve v. Lisle, [1902] A. C. 461), the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. 2 W. & T., 7th ed., p. 16. The Irish case, Re Edwards's Estate (1861), 11 / Ir. Ch. Rep. 367, is to the same effect.

I cannot help thinking that both parties intended that the two options to purchase the £30,000 debenture stock and to underwrite further capital or debenture stock if issued were to be exercisable even after payment off of the £5,000. But the decisions of this House in Noakes v. Rice, [1902] A. C. 24, and Bradley v. Carritt, [1903] A. C. 253, conclusively show, that, whatever might have been intended, Samuel could not have been entitled to exercise either option after repayment of his loan. But these decisions and the previous decision of Salt v. Northampton, [1892] A. C. 1, emphatically recognize the old doctrine, "Once a mortgage always a mortgage," which is too well settled to be open to controversy. Lord Hardwicke said in Toomes v. Conset, 3 Atk. 261: "This Court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgage upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine "Once a mortgage always a mortgage" means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage. This principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is.

Then it was contended that, as the property mortgaged was debenture stock issued by a limited company, the case did not fall within the principle to which I have been referring. I confess my inability to follow the argument on this point. Debenture stock is usually a sum of money charged on the assets of the company issuing it. It may be redeemable or irredeemable, in which case it is not a mortgage at all. But whether redeemable or irredeemable, it is capable of being made a security for money lent upon it. It can be mortgaged as well by the company which issues it as by an ordinary holder. I can discover no reason for treating a mortgage of debenture stock as something so different from other mortgages as to render the principle "Once a mortgage always a mortgage" inapplicable to it.

In my opinion the appeal ought to be dismissed with costs.

CHAPTER VI.

THE TRANSFER OF THE MORTGAGED INTEREST.

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SECTION I. - BY MORTGAGEE.

PAIGE v. CHAPMAN.

SUPREME COURT, NEW HAMPSHIRE, 1878.

[58 N. H. 333.]

Writ of Entry, on a mortgage made to secure the defendant's note, indorsed and delivered with the mortgage by the payee, to the plaintiff, before maturity, as collateral security. The plaintiff received the note and mortgage in good faith, in the ordinary course of business, and with no notice of any equities between the mortgagee and the defendant. The question, whether the defence of want of consideration, and that the note and mortgage were obtained from the mortgagor by fraudulent representations, can be made, is reserved.

ALLEN, J. Negotiable paper, received for value, before maturity, in the ordinary course of business, without notice of infirmity, is, in the hands of a purchaser, freed from defences by the maker. The same is true when the paper is received and held as collateral security. Tucker v. Savings Bank, 58 N. H. 83. A mortgage is incident to the debt secured by it, and a transfer of the note or other evidence of debt carries the mortgage with it. Wheeler v. Emerson, 45 N. H. 527. Any defences, open to the maker in a suit on the note, may be made use of in an action on the mortgage. Northy v. Northy, 45 N. H. 141. The mortgage follows the debt as a shadow does its object, and cannot exist without it. Whoever holds the evidence of debt holds the mortgage security, and payment of the debt extinguishes the mortgage. The debt is the principal thing, and imparts its character to the mortgage, and the legal rights and remedies upon the debt become fixed upon its incident, the mortgage. Defences, which cannot be made against the note because it has travelled away from them, cannot be made against the mortgage which has kept company with the note. The freedom from infirmity, which the innocent purchaser and holder of the note enjoys, cannot be destroyed or made less by taking with the note a mortgage made and intended as security. The plaintiff received the note and mortgage in good faith, before the debt had matured, and with no notice of defect or defence. The defence

sought to be set up cannot be made. Carpenter v. Longan, 16 Wall, 271; Taylor v. Page, 6 Allen, 86; Sprague v. Graham, 29 Me. 160; Pierce v. Faunce, 47 Me. 507; Gould v. Marsh, 1 Hun (N. Y.), 566; Jones on Mort. 834, 835, 840.

Case discharged.

BINGHAM, J., did not sit.

BOULIGNY v. FORTIER.

SUPREME COURT, LOUISIANA, 1865.

[17 La. Ann. 121.]

HOWELL, J. In February, 1853, the defendant, Mrs. Edmond Fortier, authorized by her husband, purchased of J. A. Livaudais a plantation and the slaves thereon, in this parish; paying part cash, giving her own four notes, secured by mortgage on the property, for a part of the price, and for the balance assuming certain encumbrances then existing on said property.

In March, 1856, during the ownership under said purchase, she issued four other notes to her own order, amounting to \$18,000; and, to secure their payment, executed a special mortgage on said property in favor of her factors, Bouligny & Ganucheau, of this city, or any holder thereof. In December, 1857, she drew four drafts, amounting to \$25,000, in favor of Wm. Holmes & Co., on, and accepted by, said Bouligny & Ganucheau, and gave the latter another mortgage on said property, to protect them against the payment thereof.

The plaintiff, Gustave Bouligny, as the holder of the last of the four notes given by her in part payment of the purchase price, in 1853, caused the property to be seized and sold under executory process; and, becoming the purchaser at said sale, retained in his hands under Art. 707 C. P. the sum of \$38,540.64, to satisfy pro tanto the said two special mortgages in favor of Bouligny & Ganucheau. In this proceeding Mrs. Edmond Fortier intervened by third opposition, making her husband, the plaintiff, and the mortgagees, Bouligny & Ganucheau, parties; and, on appeal, this court rendered a judgment in her favor, declaring the said purchase from Livaudais, and the said two special mortgages in favor of Bouligny & Ganucheau, to be for account of the legal community existing between her and her husband; releasing her from all personal liability growing out of said acts of sale and mortgage; condemning her husband to pay her, in restitution of her paraphernal property, \$46,188.38, with a legal mortgage on all his

1 Accord: Carpenter v. Longan, 16 Wall. 271; Thompson v. Maddux, 117 Ala. 468; Gabbert v. Swartz, 69 Ind. 450; Preston v. Case, 42 Ia. 549; Watson v. Wyman, 161 Mass. 96; Dutton v. Ives, 5 Mich. 515; Patterson v. Booth, 103 Mo. 402; Rayburn v. Davisson, 22 Ore. 242; Mott v. Clark, 9 Pa. St. 399; Matthews v. Hayward, 2 S. C. 239; Croft v. Buster, 9 Wis. 503. — Ed.

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immovable property; ordering the plaintiff or his succession to pay to her, in part satisfaction of said sum, the said amount of \$38,540.64, retained as aforesaid by the plaintiff, and in default thereof the said property, purchased by said plaintiff, be seized and sold for cash.

Juo. A. Merle, third opponent herein, having in due course of business become the holder of the four mortgage notes, amounting to \$18,000, issued by Mrs. Fortier in March, 1856, to Bouligny & Ganucheau, claims payment thereof, as next in rank, with privilege, out of the said sum of \$38,540.64, held as aforesaid to satisfy said two mortgages.

To this third opposition Mrs. Fortier sets up the plea of res judicata; denies that she ever derived any benefit from said transaction, and denies ownership of the property mortgaged, and generally all the

allegations of the petition of third opposition.

Upon these pleadings and the evidence (including the pleadings and evidence in the whole record in this case), the district judge dismissed the third opposition of Merle, from which judgment he appeals.

The appellees, Mrs. Fortier and husband, make a motion to dismiss the appeal, under Art. 897 C. P.; but it is manifest that this motion cannot prevail, as the evidence is before us, and the clerk's certificate is in due form.

On the merits, we are of opinion that the district judge decided correctly in dismissing the third opposition.

It will be observed that the appellant is seeking to enforce his rights of mortgage upon the proceeds of the sale of mortgaged property, and not to recover judgment on negotiable paper. As to the transferee and holder of the mortgage notes, he has no greater rights under the act of mortgage than his transferors, the original mortgagees, had; and, as to them, it is decided that this mortgage is without effect against Mrs. Fortier, and must yield to her claim or right to this very fund. The act of mortgage is not a negotiable instrument, and, unlike the notes which it secures, when assigned, is subject to all equities between the original parties. See 8 R. 435.

The record before us presents nothing to change or modify the judgment in favor of the wife. There was a community of acquests and gains existing between Mrs. Fortier and her husband when she gave the mortgage in question on the property, which is shown to be community property, and from the sale of which this fund was derived; and her right to a judgment recognizing her mortgage as attaching to said fund is not affected by any evidence adduced by Merle, the appellant.

Judgment affirmed, with costs.¹

¹ Accord: Bailey v. Smith, 14 Oh. St. 396. - Ep.

REEVES v. SCULLY.

CHANCERY, MICHIGAN, 1843.

[Walker Ch. 248.]

The bill was filed to foreclose a mortgage for \$900, payable in one year, accompanied by a promissory note payable to the mortgagee, Hawkins, or order. Hawkins indorsed the note, and assigned the mortgage to Scully, before the note was due. The mortgage and note were given to Hawkins, to secure him in paying defendant's debts; and Hawkins, as appeared from the evidence, had, at different times paid money for Scully, to the amount of \$788. Reeves was a bona fide holder of the note and mortgage, and did not know the object for which they were given to Hawkins, when he took an assignment of them.

THE CHANCELLOR. The decree must be entered for the amount of the note and mortgage. Reeves, as bona fide indorsee of the note, was not affected by the equities existing between Hawkins and Scully. It would have been otherwise, if a bond, instead of a note, had been given with the mortgage.

DAVIS v. BECHSTEIN.

COURT OF APPEALS, NEW YORK, 1877.

[69 N. Y. 440.]

This was an appeal from a judgment of the General Term of the Court of Common Pleas for the city and county of New York modifying the judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, and as modified affirming the same.

This action was brought to have a bond and mortgages on land belonging to plaintiff set aside and cancelled. The bond and mortgage were executed by plaintiff and her husband to Lawrence A. Riley, and

delivered to him as an accommodation, to be used as collateral security for the payment of a note, which he contemplated getting discounted, and under an agreement with him that he should not have it recorded. Riley failed to procure the discount and plaintiff repeatedly requested the return of the bond and mortgage; Riley promised to return the same from time to time, but failed to do so; had the mortgage recorded, and assigned the bond and mortgage for a valuable consideration to the defendant Bechstein.

Church, Ch. J. Neither the decision in McNeil v. The Tenth National Bank (46 N. Y. 325), nor in Moore v. Metropolitan Nat. Bank (55 N. Y. 41), affect the question involved in this case. Those cases hold that the owner of a chose in action is estopped from asserting his title against a bona fide purchaser for value, who purchased upon the faith of an apparent absolute ownership by assignment, conferred by the owner upon the assignee and seller, but neither of them intimated an intention to interfere with the well-settled principle, that a purchaser of a chose in action, takes it subject to the equities between the original parties, and that the assignor can give no better title than he himself has. On the contrary, GROVER, J., in the last case declared, in answer to the suggestion that these principles might be impaired by the decision, that "no one pretends, but that the purchaser will take the former (non-negotiable choses in action) subject to all defences valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse." It is only where the owner, by his own affirmative act, has conferred the apparent title and absolute ownership upon another, upon the faith of which the chose in action has been purchased for value, that he is precluded from asserting his real title, and this conclusion was arrived at by the application of the doctrine of estoppel.

At the time Riley transferred the bond and mortgage to the defendant Bechstein, as between him and the plaintiff, the mortgagor, he had no title or interest which he could transfer. The mortgage was executed and delivered to him as an accommodation, to be used as collateral security for the payment of a note of \$2,000, which he contemplated getting discounted at the New York National Exchange Bank, and under an agreement not to have it recorded. He failed to procure the discount, and the plaintiff repeatedly requested the return of the bond and mortgage, and Riley promised to return the same from time to time. It is very clear that the bond and mortgage in his hands were of no value, and that he could not have enforced them, and the defendant when he purchased, occupied no better position. could not sell any better title than he had, which was none, and the defendant could not acquire by the purchase from him any better title. The specific transaction in which the mortgage was to be used having failed, Riley's possession and right to the mortgage, after that was no different than if it had been delivered to him without any agreement for its use at all. He was then the possessor of the bond and

mortgage executed and delivered without consideration, and without authority to use it for any purpose. I have examined the evidence and am of the opinion that it is sufficient to sustain the findings of the judge, and therefore the findings are conclusive. The husband was not made a party, and a mis-trial is claimed for this reason. He had no interest as it appears in the real estate, and the defect should have been taken by answer or demurrer. Otherwise it is deemed waived.

Judgment affirmed.

CRANE v. MARCH.

SUPREME COURT, MASSACHUSETTS, 1826.

[4 Pick. 131.1]

WRIT OF ENTRY.

PARKER, C. J., delivered the opinion of the court. By the statement of facts it appears that when the demandant took his deed of mortgage he acquired only the equity of redemption of the mortgage to Day, and that subject to the lien which Billings had acquired by attachment. That attachment having ended in a judgment and sale of the equity on execution, the demandant's right was reduced to a right to redeem that equity within a year; and if he redeemed that, he would have a right to redeem the original mortgage to Day, by paying the notes which remain due. But he did not redeem nor make any tender within a year; so that if that sale of the equity was good, he has lost all his right; if void, he then has a right to redeem by paying off the two notes, because the tenant, or those whom he represents, has become entitled by assignment to that which was assigned by Day to Grout. tenant stands now in the place of the mortgagee, by virtue of the assignment of the mortgage, he has a right to require payment of the whole debt originally secured by the mortgage; and he would hold as trustee of Billings the amount of the note which had been assigned by Day to him, and then showing that J. March had paid Billings on the sale of the equity, he would have a right to retain to the amount so paid.

In determining that the sale of the equity on the execution of Billings was valid in law to pass the estate of the mortgagor, subject to the mortgage existing before the attachment, it was necessarily determined that the mortgage to Day was then in force, notwithstanding the separation of the notes from the mortgage, for otherwise there would have

¹ This case is abridged. — ED.

been no equity to sell, the legal estate being in such case revested in the mortgagor. But that could not be the case, for at the time of the mortgage to Crane, the condition of the first mortgage had been broken, and nothing but an equitable interest remained in the mortgagor. The subsequent transfer of the notes could not work a change of the title; on the contrary, according to the principles of equity courts, the mortgage remained the trustee of those to whom he had assigned the debt, and in chancery he would be compelled, either to sue the mortgage, or to foreclose for the benefit of the assignee, or to assign the mortgage to the holder of the debt. And if the power of executing this equitable principle does not exist in the courts here, still the application of the principle cannot be denied, when the form of proof will admit of it.

Judgment for tenants for cost.

JONES v. GIBBONS.

CHANCERY, 1804.

[9 Ves. 407.]

Bill by trustee in bankruptcy to set aside an assignment. Dismissed.

THE MASTER OF THE ROLLS. It is decided by Ryall v. Rowells, that debts and chattels are within the meaning of the statute. The consequence is, that, if they remain in the possession, order and disposition of the bankrupt at the time of the bankruptcy, they will pass by the assignment to the assignees. Therefore, in order completely to devest the bankrupt of such debts. he must have done everything that is equivalent to a delivery of chattels personal; that is, of movable goods; and the judges, at least one, Sir Thomas Parker, says, that which is equivalent to delivery of movables, is in the case of a debt an assignment and delivery of the security, if any, and notice to the debtor of the assignment. It might perhaps have been a question, whether after assignment and delivery of the security to the assignee, the bankrupt could be said to have the order and disposition, merely because there was no notice to the debtor of the assignment. Probably that requisite was added, as otherwise the debtor might safely pay the money to the person who had without his knowledge ceased to be his creditor. debtor would be bona fide in making the payment'; and it would be impossible to make him pay again. Sir Thomas Parker lays it down certainly, that there must be that notice.

It is then objected, that with regard to the mortgage debts no notice has been given to the debtor, and the assignments of the mortgages

were not registered in Jamaica; and the trustees admit, the reason of not registering them was, that it might have prevented him from carrying on his trade. A mortgage consists partly of the estate in the land. So far as it conveys the estate, the assignment is partly of the debt. absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual (70). The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt. With regard to the mere bond or covenant, which perhaps may accompany the mortgage, it is said, that all the ceremonies, declared to be necessary as to debts in general, ought to be observed. But it is difficult to say, the mortgage passes, and is well assigned to one person, and yet the debt remains in another. It is impossible that it can be so divided. Therefore by the assignment of the mortgage the debt necessarily passes, as incident to it; and it is clear, that, to constitute a valid assignment, notice to the mortgagor is not necessary. In Walwyn v. The Assignees of Shepard, the bankrupt had deposited a mortgage and bond; and Lord Alvanley decreed, that the assignees should execute a valid assignment: yet the mortgagor had no notice whatsoever of the deposit (71). It would be strange to say, a mere deposit would be effectual against the assignees, and a valid and complete assignment should not.

These mortgage debts therefore passed by the assignment of the mortgages, and the plaintiffs are not entitled to any account of them. With regard to the objection, that these deeds were not registered, the Registry Acts have no effect as between those claiming by conveyance and the assignees of the bankrupt, who made the conveyance. It was never held bad, because not registered; the object being purely for the protection of subsequent purchasers.

GLASSCOCK v. BALLS.

Queen's Bench, 1889.

[24 Q. B. D. 13.]

Appeal of defendant from the judgment of Lord Coleridge, C. J., at the trial.

The facts were as follows. The plaintiff as indorsee sued the defend-

ant as maker of a promissory note. The defendant had on October 11, 1882, given to one Wayman a promissory note payable to his order on demand for the sum of £289, being the note sued upon, as security for a debt. Subsequently, the defendant being then indebted to Wayman in the sum of £641, as security for part of which Wayman held the note, the latter required further security: and the defendant executed a mortgage to him of certain property to secure the total debt, with a covenant for payment of the mortgage debt. A memorandum was made at the same time to the effect that the mortgage was to be an extra security for the amount secured by the promissory note. Wayman afterwards transferred the mortgage by a deed of statutory transfer in the form given by the Conveyancing Act, 1881, to one Hall, receiving from the latter upon such transfer the sum of £700. note remaining in the hands of Wayman after the transfer of the mortgage, he indorsed it to the plaintiff as security for a debt of £200 due from him to the plaintiff. It was admitted that the plaintiff took the note without any knowledge of the before-mentioned circumstances. After such indorsement Wayman paid to the plaintiff £60 on account of his debt. The LORD CHIEF JUSTICE gave judgment for the plaintiff upon the note for £140, the balance of the debt of £200, after deducting the payment on account.

LINDLEY, L. J. I am of the same opinion. I think that the defendant fails to establish a defence either at law or in equity. The mortgage given by the defendant to the pavee of the note was accompanied by a memorandum which prevented any merger of the debt for which the note was given. It is a mistake to speak of the transfer of the mortgage as a realization of that security. Realization would be by foreclosure or sale. It is quite true that, as between the defendant and the payee of the note, after the transfer of the mortgage, in equity the right of the payee to sue on the note for his own benefit ceased, because he had parted with all his interest and could only hold the note as trustee for the mortgagor or for the transferee as the case might be. and the payee therefore could be restrained by injunction from suing on the note, unless he were entitled to sue as trustee for the transferee of the mortgage, which would depend upon the agreement between the parties. That would be the equitable right of the defendant as against But, when the note gets into the hands of a bona fide indorsee for value without notice of the facts, there can be no such equity as against him.

HOLMES v. KIDD.

EXCHEQUER, 1858.

[3 H. & N. 891.]

Declaration by indorsee against acceptors of a bill of exchange for £300, drawn by one Caleb Watson.

Plea — as to £272 2s. 7d. parcel of the amount of the bill in the declaration mentioned, that before the indorsement or acceptance of the bill the defendants applied to the said Caleb Watson to advance them the sum of £300, which C. Watson agreed to do upon the terms of the defendants accepting the bill and depositing with him a policy of insurance on the life of the defendant W. Kidd and certain canvas of the defendants of the value, to wit, of £400, as a security for the due payment by the defendants of the said bill; the said drawer of the said bill to have power of selling the said canvas and applying the proceeds of such sale in payment of the amount due on the said bill, if the same was not paid by the defendants when due: that the said bill was accepted and the said policy and canvas deposited upon the terms aforesaid, and that after the said bill was due the said drawer sold the canvas and realized by such sale £272 2s. 7d., and still retains and holds the same sum: that the bill was indorsed by the said drawer to the plaintiff, after the same was overdue and subject to the equity of the proceeds of the sale of the said canvas being applied to the payment and satisfaction of the said bill, and without any value or consideration having ever been given by the plaintiff for the said indorsement. — Demurrer and joinder.

Judgment having been given for the defendants on the demurrer to this plea in the court below, the plaintiff assigned error.

ERLE, J. We are all of the opinion that the plea is good, and therefore the judgment must be affirmed. On the drawing of the bill there was an agreement that the canvas should be a security in the hands of the drawer, and if sold the proceeds should be applied in payment of the bill, if not paid by the defendant when due. The drawer held the bill till it was overdue, when he indorsed it without value to the plaintiff, and afterwards sold the canvas and held the proceeds to be applied to the payment of the bill. The question is, whether the receipt of the money by the drawer is a bar to this action. The plaintiff took the bill subject to the equities affecting it. (In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency.

Judgment affirmed.

HOWARD v. KIMBALL.

SUPREME COURT, NORTH CAROLINA, 1871.

[65 N. C. 175.]

This was a civil action submitted to his Honor, Judge Jones, at the Fall Term, 1870, of Edgecombe Superior Court, upon the follow-

ing case agreed:

On the 1st day of January, 1867, B. B. Nicholson contracted to sell to J. W. Kimball, the defendant, a tract of land for which two notes for \$1,000 each, payable on the 1st of January, 1868 and 1869, with interest from date, were given in part payment. The notes expressed on their face to be in payment "on the Rocky Swamp tract of land." Nicholson gave to Kimball a bond to make title to the land upon the payment of the purchase-money. In the spring of 1867, Nicholson purchased of one David W. Bullock a tract of land, and in payment of the same, and for the stock on it, indorsed the said notes in blank and handed them to Bullock, he, Bullock, at the time being aware that Nicholson had given bond to make title to the tract of land he had sold to the defendant, Kimball.

Pearson, C. J. 1. Suppose Nicholson, the original vendor, had kept the land, then upon the facts agreed, Kimball, the vendor, would have had a clear equity to rescind the contract of sale, on the ground of a defect in the title, to a substantial part of the thing sold. A purchaser is entitled to all that he bargains for, and is under no obligation to accept a part, with warranty as to the other, or to accept compensation, unless indeed the part, as to which a good title cannot be made, does not materially affect the value, and it can be seen that the objection is not taken upon the merits, but as a pretext to get rid of the bargain.

2. As Nicholson indorsed the notes in blank to Bullock, before maturity, there is a presumption that he purchased without notice; but this presumption may be rebutted by proof of any fact that should put a man of ordinary prudence upon inquiry. We think the fact of the notes not being in the usual form of promises to pay money "for value received," but expressing on the face that they were given for the purchase-money of the Rocky Swamp tract of land, was sufficient to put Bullock on inquiry, and to fix him with notice, that the notes could not be collected, unless a good title be made to Kimball. Cox v. Jerman, 6 Ire. Eq. 526. In this way significance is given to the words referred to, otherwise they must be treated as idle and superfluous.

It is said notice that the notes were given as the consideration of the Rocky Swamp tract of land does not amount to notice of a defeet in the vendor's title. That may be so, but it does amount to notice of the vendee's equity, provided it turns out that the title is defective.

If a vendee executes a plain note of hand, this equity may be defeated by a transfer of the note before it is due, but when he takes the precaution to set the fact out in the face of the note, unless it has the effect of notice, the vendor may in every instance defeat the equity of the vendee by making haste to dispose of the note, and thus the vendee will be deprived of an equity without default on his part.

The fact that Bullock took a deed for the land from Nicholson in trust to convey to Kimball on payment of the purchase-money, substituted Bullock in the place of Nicholson, and put him in the relation of vendor in respect to Kimball. He was to receive the whole of the purchase-money and to make title, according to the original contract of sale.

3. Such being the equity of the defendant as against Nicholson and Bullock, it is so beyond all question in regard to the plaintiff, for he had positive notice of the defect in the title before he purchased the notes, and he also took a deed for the land in trust to make title on payment of the purchase-money, and took upon himself the relation of vendor towards the defendant.

We concur with his Honor, that the plaintiff was not entitled to judgment, but the judgment rendered for the defendant is erroneous in this: it discharges the defendant from the payment of the purchasemoney, but leaves the bond for title in his hands, as a cloud over the title of the plaintiff.

The judgment ought to have been, that the contract of sale be rescinded, and the title bond and the notes be cancelled, so as to effect what would have been done in equity under the old mode of procedure.

Such judgment will be entered, and each party will pay his own cost.

PER CURIAM.

Judgment accordingly.1

1 Compare: Zebley v. Sears, 38 Ia. 507. - ED.

TURNER v. SMITH.

TURNER v. SMITH.

CHANCERY DIVISION, 1900.

[1901. 1 Ch. 213.]

THE object of this action was to establish the priority of the plaintiff, as mortgagor, over the defendant as transferee of a mortgage originally made by the plaintiff, and to obtain a reconveyance of the mortgaged property freed from the incumbrance claimed by the defendant, and delivery up of the title-deeds on payment of the costs of reconveyance. The case arose from the frauds of the late Cartmell Harrison, a solicitor.

BYRNE, J., after stating the facts, continued: The real question is, which of the two innocent parties, the plaintiff or defendant, is to suffer for the frauds of Cartmell Harrison, the plaintiff claiming that upon the transfer to Cartmell Harrison by Hamp the mortgage debt was discharged, and that by taking a transfer without the privity of the mortgagor, the transferees, Messrs. Smith, became bound by the state of account as then existing between their transferor and the mortgagor. and that therefore the defendant cannot claim to hold the property as against the plaintiff. On the other hand, it is contended that the plaintiff, by her neglect, in not seeing that she obtained a reconveyance or receipt for the mortgage money, and by not asking for the deeds, put it into the power of Harrison to commit the fraud, and gave color to the false representations which were made in the transfer to Messrs. Smith as to the subsistence of the mortgage debt. It is also suggested that the two transfers of October 4 and 5, 1897, must be looked upon as parts of one transaction, and that the transfer to Harrison ought not to be regarded as representing anything more than part of the machinery for transferring the debt and security from Hamp to Messrs. Smith, and not as representing any real transaction. Up to the date of the transfer to Cartmell Harrison the plaintiff admits that, as between herself and the subsequent transferees, there was a valid and subsisting debt and mortgage security, inasmuch as no part of the debt had been paid, although Harrison, as the plaintiff's agent, had received the money for the express purpose and with the obligation of paying off the then mortgage in the year 1893. The effect in law of taking a transfer of a mortgage without the privity of the mortgagor has been so recently summed up by Cozens-Hardy, J., in the case of Dixon v. Winch, [1900] 1 Ch. 736, that I cannot do better than adopt his words, which are to be found at p. 742 of the report: "It is well settled that where a mortgage

is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: Matthews v. Wallwyn, 4 Ves. 118. And it is also well settled that payments of interest or payments on account of principal made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee: Williams v. Sorrell, 4 Ves. 389. This doctrine has been extended to the case where the whole mortgage debt is, under similar circumstances, paid off: see Norrish v. Marshall, 5 Madd. 475, and In re Lord Southampton's Estate, 16 Ch. D. 178." I need not refer to the expression of opinion which follows because the learned judge recognizes the law as stated, nor need I go further into the decision in that case either in the court of first instance or in the court of appeal, as it turned on very special facts which differ from those in the present case. Starting with the statement of the law as above, it appears to me that, assuming the transfer to Harrison to have operated as an assignment and conveyance to him in his personal capacity, and not in the capacity of trustee for Smith, the result must follow that the mortgage debt immediately became discharged, and that he held the property as trustee for the plaintiff, the principle being as stated by Sir John Leach in Norrish v. Marshall, 5 Madd. 481: "That as against an assignee without notice" (meaning without notice to the mortgagor) "the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set-off, or mutual credit, as against the mortgagee, he can claim equally against the assignee." There is no evidence that Harrison had agreed to invest Smith's money in a particular mortgage, and, although it is not very easy to understand why Harrison took the transfer to himself only to transfer it on the following day, the fact remains that he did take a transfer to himself, and it may be that, being uncertain whether he should get the money from Smith, he obtained the transfer to himself before receiving the cheque. He certainly did so before the cheque was credited to him. The money paid by Harrison to Negus was paid by cheque drawn on the account of the firm of Ingram, Harrison, & Ingram at Messrs. Hoare's by cheque debited to the firm on October 5; and I am unable to hold that at the time of the transfer to himself he had constituted himself a trustee of this particular security for the Messrs. Smith; and I think, therefore, that the latter, having taken the transfer from Harrison without the privity of the mortgagor, the defendant can only hold it against the latter subject to the state of account between Harrison and the mortgagor. As between Harrison and the mortgagor, the mortgage debt was non-existent. appears to me that the mortgagor never lost her right to redeem, and that directly her agent, who had received the amount to pay off the mortgage, became himself the transferee of the mortgage, the debt was extinguished, and no transferee from him could treat the debt as a

subsisting charge upon the property. In the result, I think the plaintiff is entitled to succeed and to have a reconveyance.

KERNOHAN v. MANSS.

SUPREME COURT, OHIO, 1895.

[53 Ohio St. 118.]

Error to the Circuit Court of Hamilton county.

The action below was a proceeding in the probate court of Hamilton county for the sale of lands of Gano Martin, deceased, to pay debts, in which the plaintiff in error and the defendants in error were crosspetitioners, each claiming to hold a lien prior to that of the other upon the lands in question. That court found in favor of John and Louis Manss, from which Kernohan appealed.

SPEAR, J. The question presented by the record is whether, both parties acting in good faith, one who obtains title to a mortgage given to secure several notes to several persons, by assignment for value by one of the mortgagees with delivery of the same and a forged copy of one of several notes secured thereby, indorsed by the payee who was then the owner of the genuine note, obtains a lien for money thus advanced on the faith of the security, in preference to the bona fide indorsee for value of the genuine note obtained afterwards, both transactions occurring before the maturity of the note?

It seems to us that the question will be solved by the application of simple and well established principles. The concession that each party acted in entire good faith removes any necessity for considering equities, and leaves the case to be determined on purely legal grounds.

The following propositions we consider are settled in Ohio:

1. Where a promissory note is secured by mortgage, the note, not the mortgage, represents the debt. The mortgage is, therefore, a mere incident, and an assignment of such incident will not, in law, carry with it a transfer of the debt; on the other hand a transfer of the note by the owner so as to vest legal title in the indorsee will carry with it equitable ownership of the mortgage. And so, if the debt be evidenced by several promissory notes, the legal transfer of a portion of the notes

carries with it such proportional interest in the security as the notes transferred bear to the whole. Harkrader v. Leiby, 4 Ohio St. 602; Ex'rs of Swartz v. Leist, 13 Ohio St. 419; Fithian v. Corwin, 17 Ohio St. 118; Allen v. Bank, 23 Ohio St. 97; Holmes v. Gardner, 50 Ohio St. 167.

- 2. Being but an incident of the debt, the mortgage remains, until foreclosure or possession taken, in the nature of a chose in action. Where given to secure notes it has no determinate value apart from the notes, and, as distinct from them, is not a fit subject of assignment. And where the notes are legally transferred, the mortgagee, and all claiming under him, will hold the mortgaged property in trust for the holder of the notes. Jordon v. Cheney, 74 Me. 359; Jones on Mortgages, 818; Pomeroy's Eq. Jur., section 1210.
- 3. All notes payable to any person or order are negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof in each and every indorsee or holder successively. Such indorsee, or holder, may, in his own name, institute and maintain an action thereon against the maker. Sections 3171 and 3172, Revised Statutes.
- 4. A holder of negotiable paper who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity, holds it by a good title. To defeat a recovery it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. Nor does the note lose its commercial character when secured by mortgage. Johnson v. Way, 27 Ohio St. 374; Kitchen v. Loudenback, 48 Ohio St. 177.

Applying these rules to the facts, the following conclusions seem to result, viz.:

Kernohan, by the assignment of the mortgage, took the legal title to it so far as the same was owned by McGill, and an equitable right in the \$7,602.72 note. He did not take, nor did McGill intend to transfer to him, any legal title to the note, for McGill kept, and intended to keep that in his own possession, unindorsed, and subject to his continued control. Such rights as Kernohan took he might assert as against McGill, but John and Louis Manss alone can recover on the note. They, by their purchase and the indorsement to them by McGill, took a full title to it as against the world, together with the equitable title to the mortgage in whosesoever hands it might be. The one has the legal title to the incident, with an equitable right in the debt; the other the legal title to the debt, together with an equitable title to the incident. As both cannot have precedence, the weaker must give way to the stronger. The legal title to the incident must be subordinated to that

which is superior, viz., the legal title to the debt, although the holder of the incident acquired his right first. John and Louis Manss were, therefore, entitled to the proceeds of the mortgaged lands.

The case of Kernohan v. Durham, 48 Ohio St. 1, is relied upon by plaintiff in error. We think it does not support his contention. In that case Coddington took by indorsement the genuine note after due. Kernohan took an assignment of the mortgage, which assignment also purported to transfer the note. This was not only before the transfer of the note to Coddington, but before the note was due. The holding is, that, as between Kernohan and McGill (the payee), the former took an equitable title to the genuine note, and hence, as Coddington's title was acquired after the note had been dishonored, he could take no better right than his indorser had. The note being past due, he was put upon inquiry, and was chargeable with whatever knowledge due inquiry would have elicited. The vital difference between the position of the holder of the note in that case and in this is, that, while Coddington took his title after due and hence was charged with all infirmities, John and Louis Manss being indorsees and purchasers for value in the ordinary course of trade, before due, took good title as against the world.

Judgments affirmed.1

¹ Compare Kernohan v. Durham, 48 Oh. St. 1. - ED.

MORRIS v. BACON.

SUPREME COURT, MASSACHUSETTS, 1877.

[123 Mass. 58.]

BILL IN EQUITY by Nathan Morris and the Tremont National Bank of Boston against Josiah Bacon, for the assignment to the bank of a mortgage made by Morris to Abraham Jackson. Hearing upon the pleadings and proofs before Devens, J., who made a decree for the bank, from which the defendant appealed. The facts appear in the opinion.

Lord, J. On April 1, 1870, the plaintiff Morris made a promissory note for the sum of \$4,000, payable to the order of Abraham Jackson in five years from that date, and executed a mortgage at the same time of certain land in Boston to Jackson, to secure the payment of the note, and delivered both note and mortgage to Jackson, who caused the mortgage to be recorded on April 5, 1870. On or about October 21, 1872, Jackson indorsed the note to the Tremont National Bank as collateral security for a loan to a larger amount, made at that time by the bank to him, stating at the time that the note, which upon its face purported to be secured by mortgage, carried the mortgage with it.

This was the condition of the title to the note and mortgage on or about March 2, 1875. The plaintiff bank was owner of the note, and Jackson had the legal title to the mortgage in trust for the bank. On that day Jackson undertook to sell the note, with its security, to the defendant. He had, however, neither the title nor the possession of the note, nor any authority to sell the same. He could therefore convev no title to it. In order to seem to have a title which he could convey, he fraudulently substituted another note for the note which the mortgage was made to secure. This fraudulent substitution could give no right against the maker or the owner of the note. Neither Jackson nor the defendant could by any act, in the absence of the plaintiffs, convert the mortgage into a security for any other than the note which it was made to secure. Jackson fraudulently attempted to apply the mortgage to a note which it was not given to secure. Neither of the plaintiffs did anything, or allowed anything to be done, in furtherance of the fraud. If the plaintiff Morris had paid the note between 1870 and 1875, leaving the mortgage still in the hands of Jackson undischarged, no one would contend that Jackson could by any mode have made the mortgaged property liable to a new debt. No person could derive from Jackson any title under that mortgage, except a title as collateral security for the debt. If the debt itself was not in existence, the assignee could take under any circumstances, at most, only a naked legal title to the mortgage; if the debt existed, and was not transferred to the mortgagee, the mortgage would be held only in trust for that debt, not for a different debt. That the debt is the principal and the mortgage an incident, is a rule too familiar to require citations in support of it.

Assuming, for the sake of argument, that the note held by the defendant is a genuine note, the case finds that it is not the note which the mortgage was given to secure; and the plaintiff Morris has never created a lien upon his estate in favor of that debt, and it cannot be contended that Jackson could by any act of his create such a lien. the holder of the true note had in fact consented that the mortgage might be assigned to the defendant as collateral security for another note of the same tenor and date, that could not have made it so. equity it might have operated as a conveyance of the true debt to the defendant we need not decide, for there is no claim or pretence that such holder did thus consent. There was simply neglect on the part of the plaintiff bank to take an assignment of the mortgage. most hazard which the holder took was that Jackson might discharge the mortgage, in which case the note would still be a valid security; or Jackson might pass the legal title to another, who in law would become the trustee of the owner of the note.

This case is quite distinguishable from Blunt v. Norris, ante, 55. In that case the plaintiff acquired no rights beyond those of Samuel S. Jackson, who never owned the note, and who passed it, without indorsement, against the rights of the maker, so that there was no debt of the maker to which the mortgage could be incident. In this case Abraham Jackson was the bona fide owner of the note and the mortgage security, and transferred the note by indorsement before maturity, with the assurance that it was secured by mortgage.

Decree affirmed.



M'VAY v. BLOODGOOD.

SUPREME COURT, ALABAMA, 1839.

[9 Porter, 547.]

Ormond, J. This was a case agreed. The material facts are, that one George W. Sinclair, being indebted to one Thomas R. Bolling, in the sum of eight thousand dollars, executed four several promissory notes, for two thousand dollars each, payable at three, six, nine and twelve months after date; and to secure their payment, conveyed to Abner S. Lipscomb, certain personal property, in trust, to secure to Bolling the payment of the said promissory notes.

The first of said notes was paid: the second note was by Bolling indorsed to one Fearn, for a valuable consideration, who indorsed it to the defendant in error; and afterwards, the remaining two notes were by Bolling transferred to the plaintiff in error, between whom and Bolling, an instrument was then executed, by which all the interest of Bolling in the trust, and executed to secure the payment of the said notes, was transferred to the plaintiff in error.

The trustee sold the property conveyed by the deed of trust, for twelve hundred dollars, and paid over the money to the plaintiff in error.

The court below determined that Bloodgood, the assignor of the second note, was entitled to the fund; and of that opinion is this court. By the express stipulation of the deed of trust, the property conveyed by the deed of trust, was liable to be sold for the payment of the notes, as they severally fell due. There was, therefore, a priority of right to the avails of the property in the holder of the notes due at three months after date, over the plaintiff, whose notes did not fall due until nine and twelve months. This is conclusively shown by the fact, that on default of payment, the property might have been advertised and sold under the deed, before the other notes were due: this clearly establishes the prior right of the defendant in error; and this right, which existed against Bolling, he could not defeat by the transfer to the plaintiff in error, who can be in no better condition than Bolling. There is no fraud alleged against the defendant in error, and the deed of trust, which recited that other notes were in existence, for which the property was bound, was sufficient notice, at least, to put the plaintiff on inquiry.

The precise question here decided, was thus determined in the case of Gwathmeys v. Ragland, 1 Randolph, 466; see also 1 Hopkins' Chancery Rep. 569, and 5 Johnson's Chan. 241, Clover v. Dickinson.

Let the judgment be affirmed.

1 Accord: Wilson v. Haywood, 6 Pla. 171; Koester v. Burke, 81 III 436; Doss v. Ditmars, 70 Ind. 451; Waller v. Schrieber, 47 Ia. 529; Richardson v. McKim, 20 Kaus. 346; Mitchell v. Ladley, 36 Mo. 526; Anderson v. Sharp, 44 Oh. St. 260; Wood v. Treek, 7 Wishelf & Ep.

PENZEL v. BROOKMIRE.

Supreme Court, Arkansas, 1888. [51 Ark. 105.]

BATTLE, J. On the 16th of March, 1885, James Quigel executed to West Brothers three promissory notes, one for \$150 due on the 16th of June, 1885, one for \$125 due on the 16th of August, 1885, and the other for \$116 due on the 16th of November, 1885, and at the same time executed a mortgage to secure their payment. On the 17th of March, 1885, West Brothers transferred the note for \$150 to Charles F. Penzel, and thereafter transferred the one for \$125 to H. Friedlander & Son, as collateral to secure a debt, and the one for \$116 to Brookmire, Rankin & Scudder. After the maturity of the first two notes, Penzel took possession of a part of the mortgaged property, and sold the same, with the consent of all parties concerned, at private sale, for \$216 on a credit, of which \$50 have been collected.

The mortgage contained no stipulation as to the order in which the notes should be paid. It is not alleged in the pleadings, and was not claimed in the court below, and is not insisted on here, that there was any agreement between the mortgagees and any one of their assignees as to the order of precedence each note should take, or that there was any special equities rising out of the assignments. There is no issue of that kind in the case. Appellants insist that Penzel should be first paid out of the property mortgaged, because he is the holder of the note first falling due and first assigned; and appellees insist that the proceeds should be paid ratably upon the notes, without regard to the order in which they fell due or were assigned. The only question here is, which of these contentions is correct?

In the absence of such a stipulation or agreement, or special equities, the authorities are not agreed as to how the proceeds of the sale of property, mortgaged to secure the payment of several notes and sold under the mortgage, shall be appropriated, when the notes secured mature at different times, have been assigned to different persons, and the proceeds are not sufficient to pay all of them. One class holds that the notes shall be paid in the order of their assignment. Another, that the notes should take precedence in the order of their maturity. And a third class, that the proceeds should be applied pro rata in part payment of the several notes, irrespective of their dates of maturity or assignment.

The authorities which hold that the notes should be paid in the order in which they were assigned, do so upon the ground that the debt secured was the principal and the mortgage an accessory, and that the transfer of a part of the debt carried with it the assignment of so much of the lien created by the mortgage as is necessary to pay

the part assigned, as effectually as it existed in the mortgage; and that no second assignment can divest the first assignee of his lien and preference.

The courts adhering to the doctrine that the notes should be paid in the order of their maturity, say that the debt is the principal thing and the mortgage to secure it is only an incident; that the assignment of the debt passes the mortgage without being referred to in the assignment; that "the assignee of the debt takes the security by the assignment, in the same condition and to the same extent it was held by the payee at the time of the assignment, as security for the debt assigned, and succeeds under it to all the rights of the assignor;" that the assignor, the payee, in the absence of a stipulation to the contrary, had the right to foreclose the mortgage when default should be made in the payment of the notes first falling due, and as each one should fall due, and satisfy them out of the proceeds in the order of their maturity, so far as the proceeds would extend, although there should not be enough to pay all; and that, therefore, inasmuch as the assignee, by the assignment of any one of the notes, succeeded to the rights which his assignor had, he has the right, in the event there is not enough to pay all, to be paid out of the mortgaged property so far as it will extend, according to the order in which his note stands in the line of maturity with the others secured by the mortgage; and that "the different instalments in a mortgage, when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming pavable."

The reasons assigned for the two doctrines first mentioned are not convincing. While the notes were in the hands of the mortgagee there could be no priority of liens. He was not bound to foreclose when default was made in the payment of the note first falling due. could have waited until all became due, and then, if the mortgage empowered him to sell when default should be made in the payment of any one of the notes, have sold the property and appropriated the proceeds of the sale, if the mortgage did not forbid, to the payment of any of the notes, if there were not more than enough for that purpose. If he appropriated the proceeds to the payment of the note first falling due, it thereby attained a preference, through the act of the mortgagee, and so might have the second or last in the same The mortgagee being the owner of all the notes, unrestricted by the mortgage, can give the preference in the appropriation of the proceeds to either of them by virtue of his ownership and control over the entire mortgage debt; and the question of preference or right to priority in payment out of the proceeds can only arise when there is a diversity in the ownership of the debt secured. Hence, the assignment of one of the notes could not, ipso facto, carry with it the right to be paid in preference to the other notes, because the mortgagee had the right to appropriate the proceeds of the sale of the property mortgaged to its payment; for the condition on which the mortgagee could have exercised the power, does not exist in the case of the assignee of one of the notes; and for the same reason it follows that the assignee of the note first falling due is not entitled to preference, because the mortgagee could have given preference in the appropriation of payments when he owned all the notes.

The comparison of a mortgage given to secure several notes to successive mortgages given to secure each one of them does not support the doctrine it is made to prove. To make the cases analogous, the mortgages to secure each note must bear the same date, and be executed, delivered, and filed for record, and recorded, at the same time, and the property mortgaged must be the same. In the latter case the mortgages would be concurrent; neither one would have preference over the others, and all would have equal claims to be paid ratably out of the property mortgaged. If one should be transferred to a third party it would not thereby become paramount to the others, but all would stand on an equality. Hence the comparison does not sustain the doctrine that the notes, while in the hands of different persons, are entitled to priority of payment according to the order in which they mature.

We do not think that either of the doctrines laid down by the two classes of decisions first mentioned is sustained by reason or equity. The notes are secured by one mortgage, executed for the equal benefit of all. It does not provide that one note shall be preferred to the others, but secures all equally or pro rata. The legal title to the property mortgaged is conveyed and held for the benefit of all. rights and interests acquired in the property begin with the date of the mortgage, and not from the maturity or assignment of the notes, or the time when the cause of action arises. There can be no priority of rights in favor of one against the others, as the mortgage is one. The simple assignment of the notes does not change the mortgage and make it any less security for any of the notes than it was before the assignment. The mortgage security, in following the transfer of the notes as an incident, does not pass by the assignment any farther than it was an incident at the time the transfer was made. The holders of the notes, therefore, stand æquile jure, and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all.

The decree is affirmed.1

¹ Accord: Grattan v. Wiggins, 23 Cal. 16; Laplace v. Laplace, 43 La. Ann. 284; Dixon v. Clayville, 44 Md. 573; Jennings v. Moore, 83 Mich. 231; Pugh v. Holt, 27 Miss. 461; State Bank v. Matthews, 45 Neb. 430; Swatz v. Leist, 13 Oh. St. 419; Perry's Appeal, 22 Pa. St. 43; Gordon v. Hazzard, 32 S. C. 351; Bartlett v. Wade, 66 Vt. 629.—Ep.

SECTION II. - BY MORTGAGOR.

TWEDDELL v. TWEDDELL.

CHANCERY, 1787.

[2 Bro. C. C. 152.]

At the close of the argument, his Lordship expressed himself to this effect:

This appears to be the common case, where a man buys an equity of redemption. The question is, whether he becomes personally liable to the mortgagee. The buyer takes it subject to the charge; but the debt, as to him, is a real, not a personal debt. His contract with the mortgagor is only that the debt shall not fall upon him; it is a mere contract of indemnity, and he would be bound, without any specific contract, to indemnify him, as long as he can pay the money.

His Lordship affirmed the former order, allowing the demurrer.1

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BURR v. BEERS.

COURT OF APPEALS, NEW YORK, 1861.

[24 N. Y. 178.]

APPEAL from a judgment of the Supreme Court. The action was brought to recover the amount of two mortgages executed, with his bonds, by E. F. Bullard to John Cramer, committee of the estate of Charles Burr (the plaintiff's intestate), for \$1,000 and \$2,000 respectively. After giving the mortgages, which covered several parcels of lands, Bullard conveyed both parcels to the defendants by a deed containing a recital and covenant in the following words: "Subject to two mortgages held by John Cramer, committee of the estate of Charles Burr, bearing date, &c. [describing the mortgages], which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay." Charles Burr was restored to the possession and _control of his estate, by an order of the Supreme Court; and he prosecuted this suit to judgment, but died pending this appeal, when the action was continued in the name of the plaintiff as his administratrix. The plaintiff on the trial proved the actual delivery of the deed by

¹ Compare: Re Errington, 1894 1 Q. B. 11; Barry v. Harding, 1 Jones & Lat. 475; Adoris v. Hicks, 21 Ont. 95; Rice v. Saunders, 152 Mass. 108. — Ep.

Bullard, to the defendant. The defendant objected that there was no privity of contract between him and the plaintiff; but the justice (before whom the case was tried without a jury) held otherwise. Judgment was given for the plaintiff for the amount of the mortgages, which was affirmed at a general term when the defendant appealed to this court.

Denio, J. If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects. Curtis v. Tyler, 9 Paige, 432; Halsey v. Reed, id. 446; March v. Pike, 10 Paige, 595; Blyer v. Monholland, 2 Sandf. Ch. R. 478; King v. Whitely, 10 Paige, 465: Trotter v. Hughes, 2 Kern, 74; Vail v. Foster, 4 Comst. 312; Belmont v. Coman, 22 N. Y. 438. But I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract between the grantee of the equity of redemption and the holder of the mortgage. The cases proceed upon the principle. that the undertaking of the grantee to pay off the encumbrance is a collateral security acquired by the mortgagor, which enures by an equitable subrogation to the benefit of the mortgagee. Then the statute relating to foreclosures provides, that if the mortgage debt be secured by the obligation or other evidence of debt executed by any other person besides the mortgagor, such person may be made a defendant, and may be decreed to pay the deficiency. 2 R. S. p. 191, § 154. Chancellor Walworth puts the right to a personal judgment in such a case upon the equity of this statute (9 Paige, 432); and Vice Chancellor Sanford expressly says that the obligation is not enforced as being made by the grantee of the equity of redemption under such a deed, to the mortgagee, but as a promise by the former to the mortgagor, to pay him the amount of the mortgage, by paying it to the mortgagee in payment of his debt, which promise the mortgagee is equitably entitled to lay hold of and enforce under the equity of the statute referred 2 Sandf. Ch. R. 480. It is obvious that the judgment of the Supreme Court in the present case cannot be sustained upon the The plaintiff does not ask to foreclose the mortdoctrine referred to. gage and does not make the principal debtor, Bullard, a party. the judgment can be supported at all, it must be upon the broad principle that if one person make a promise to another, for the benefit of a third person, that third person may maintain an action on the Upon that question there has been a good deal of conflict of judicial opinion. As long ago as 1817, Chancellor Kent laid it down as a point decided, and referred to not less than eight English and American cases as sustaining the principle (Cumberland v. Codrington, 3 J. C. R. 255); and since then it has been frequently affirmed by judges, after an attentive examination of cases, as in Barker v. Bucklin, 2 Denio, 45, and in the cases herein referred to. These cases. and also those referred to by Chancellor Kent, are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure obiter dicta, and in others the cases, though presenting the point, were decided upon other grounds. It cannot, however, be denied that the doctrine had been so often asserted that it had become the prevailing opinion of the profession that an action would lie in such a case in the name of the creditor, for whose benefit the promise was made. Finally, the question came squarely before this court in Lawrence v. Fox, 20 N. Y. 268, and we held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the courts of this State are concerned.

The judgment appealed from being in accordance with the law as adjudged in that case, must be affirmed.

LOTT, J., also delivered an opinion for affirmance, and all the judges concurred.

Judgment affirmed.

CARNAHAN v. TOUSEY.

SUPREME COURT, INDIANA, 1883.

[93 Ind. 561.]

Woops, J. The only question discussed by the apellants is the sufficiency of the complaint on which judgment was rendered against them. The complaint, so far as its averments need be rehearsed, shows that Carnahan and Finch purchased of Spiegel a tract of land, which was subject to a morroace made by Spiegel. In the deed of Spiegel to the appellants, which they accepted, it was stipulated that the appellants should assume and pay the mortgage debt. Carnahan afterwards conveyed his interest in the land to Finch, by a deed which also contained an agreement that Finch should assume and pay the mortgage debt. The action is by an indorsee of the mortgage notes, and in the complaint are set out copies of the notes and nortgage and of the deeds aforesaid. The plaintiff prayed and obtained a personal judgment against the appellants upon their contract of assumption.

The objections made to the complaint are that it shows no privity of contract between the appellants and the plaintiff or the original payee of the notes, nor that the appellants were still in possession of the land, or any part of it, when the action was commenced, and that no acceptance of the contract of assumption, either by the payee and mortgagee or by any subsequent holder of the paper, is alleged.

¹ This case represents the general American law. The cases are collected in an elaborate note in Wald's Pollock on Contracts (Williston's edition), p. 260 et seq.—ED.

In an action upon contract at law, strictly, privity of contract is essential to the right of action, but the rule in equity is different, and by a long and unbroken line of decisions since Bird v. Lanius, 7 Ind. 615, this court has held that a promise of one person to another for the benefit of a third may be enforced in an action brought by the latter in his own name. Rodenbarger v. Bramblett, 78 Ind. 213, and \sim cases cited; Davis v. Hardy, 76 Ind. 272; Tinkler v. Swaynie, 71 Ind. 562; Medsker v. Richardson, 72 Ind. 323.

No authority is cited in support of the proposition that it was necessary to aver that the appellants still held the land, in consideration for which they had assumed to pay the mortgage debt; and no argument is made which commands our assent. The contract of assumption certainly did not cease to be operative and binding in favor of the party with whom it was made on account of any subsequent transfer of the lands by the appellants, and if still enforceable by the original party, to whom it was made, there can be no good reason why it should have ceased to enure to the benefit of the holder of the obligation, which was assumed. Rodenbarger v. Bramblett, Each successive grantee who assumes the payment of an encumbrance necessarily remains bound to his grantor until the encumbrance has been removed, unless otherwise released from the obligation, and so long as not discharged or released the contract necessarily operates in favor of the holder of the encumbrance, who, if he chooses, may accept and enforce it; and though each grantee has bound himself by a separate agreement, yet, as all have assumed ... the payment of the same debt, they may be sued in one action, the last being held primarily liable, and each in the inverse order of his McGill v. Gunn, 43 Ind. 315. Judgment affirmed.¹ contract.

FIELD v. THISTLE.

CHANCERY, NEW JERSEY, 1899.

[58 N. J. Eq. 339.]

EMERY, V. C. This is a bill for deficiency filed by the mortgagee against Thistle, the obligor and mortgagor, and against the successive grantees of the mortgaged premises, being Royle, Bray, and McChesney, in the order named, who have, it is claimed, assumed the payment of the mortgage in their respective deeds. The mortgaged property was sold under foreclosure proceedings, to which the mortgagor and the grantees were parties defendant, and a deficiency

¹ Accord: Flint v. Cadenasso, 64 Cal. 83; Ingram v. Ingram, 71 Ill. App. 497; Gifford v. Corrigan, 117 N. Y. 257. — Ep.

of over \$900 exists. On the day before the sale, Thistle, the mortgagor, released his grantee, Mrs. Royle, from her covenant of assumption, and she also released her grantee, Bray, from his covenant to assume made in her deed to him. The covenant of McChesney, the last grantee, with Bray has not been released, but McChesnev has died since the conveyance, and his executors, who are parties as his devisees, claim that the right to recover against them is barred by reason of the failure of complainant to exhibit his claim under oath within the time limited by the order to bar creditors, upon which a decree barring creditors has been duly made. The sale under foreclosure was not made, however, until after the expiration of the time limited by the order for presenting claims, and this defence of failure to present the claim must therefore be overruled on the authority of Terhune v. White, 7 Stew. Eq. 98 (Chancellor Runyon, 1881), which holds that before foreclosure the claim is contingent and cannot be proved against the estate. The first question in the case is the construction of the clause of assumption in the deed from Thistle to the defendant Mrs. Royle, then Mrs. Cross. The covenant is as follows (punctuatim et literatim):

"This conveyance is made expressly subject to a mortgage encumbrance of three thousand dollars, given by the said Hugh B. Thistle to the said Josie Downing Smith, dated October (1st., 1886) first, eighteen hundred and eighty six. Together with interest and taxes from October first eighteen hundred and eighty six. All of which are assumed by the party of the second part."

Mrs. Royle claims that by the true construction of this covenant the clause of assumption reaches only the interest and taxes from October 1, 1886, and not the principal of the mortgage. I think, however, that "all of which" means "every one of which," and must include every one of the encumbrances previously set out, being the mortgage of \$3,000, interest and taxes, and cannot be restricted to the last two encumbrances. In Wise v. Fuller, 2 Stew. Eq. 257 (1878), Vice Chancellor Van Fleet (at p. 266) construes a somewhat similar contract in reference to a like objection.

The assumption of Mrs. Royle extends, therefore, to the payment of the mortgage, and as to form there is no question in reference to the subsequent assumptions by the other grantees. The question on these relates to the effect of the releases, which were made before the beginning of this suit, but after decree of foreclosure in a suit to which all parties to the foreclosure were parties, and in which suit they were made parties, as ultimately responsible for any deficiency resulting in the sale.

Complainant (by her amended bill) alleges that at the time of making the releases, Thistle, the mortgagor, was insolvent, and that the releases were made in fraud of her rights as a creditor, after notice of her claim. The defendants Thistle, Royle, and Bray, answering separately, deny the fraud charged. Mrs. Royle and

Bray deny the assumption of the mortgage by Mrs. Royle, and Bray alleges, in addition, that the clause of assumption in the deed from Mrs. (Cross). Royle to him was inserted by mistake. McChesney's executors also set up the insertion by mistake in the deed from Cross to Bray, and also that the same clause was inserted by mistake in the deed from Bray to McChesney. If the releases had not been given, the defences of alleged mistake set up in these answers could perhaps be considered only on cross-bill. Green v. Stone, 9 Dick. Ch. Rep. 387 (Errors and Appeals, 1896), and cases cited, p. 400. But it is claimed that the parties have the right by their releases to reinstate or restore voluntarily the equities which could otherwise have been enforced by suit, and that the question of fact is whether the consideration of the releases was the bona fide restoration of these equities, or whether the releases were tainted with fraud on a creditor. This claim proceeds of course upon the theory that the releases could be made by the acts of the parties after filing of the bill to foreclosure, in which the releasors were made parties, as ultimately liable for the deficiency. On this assumption and considering the evidence, I conclude that the clause of assumption was not inserted by mistake in the deed from Mrs. Cross to Bray, but/ that it was specially inserted in her deed to Bray with the special object on her part of protecting herself in case she was liable for the mortgage on her own covenant. This appears by her own evidence. and there being no mutual mistake there could have been no reformation of the deed based on this ground. Green v. Stone, 9 Dick. Ch. Rep. 387, 396. Bray's defence of mistake therefore fails, whether considered as a substantial equitable defence to an existing covenant of assumption, or as the consideration of a release of such covenant. No other consideration for the release to Bray than this alleged mistake was either set up in the pleadings or urged at the hearing. No evidence of mutual mistake in the deed from Bray to McChesney was given. I conclude also upon the evidence that the releases, whatever their consideration as between the parties, were actually intended to defraud complainant as a creditor of Thistle. Thistle was hopelessly insolvent, judgments of about \$40,000 appearing to have been outstanding for several years and the releases were a'l made as part of one transaction by which upon Thistle's releasing Mrs. Cross, she in turn was to release Bray, and this was the plan actually carried out. These releases were made after the foreclosure suit had commenced and notice received that complainant relied on their liability, and the circumstances of Thistle's release were such as to charge Mrs. Royle and Bray with the duty of inquiring into his financial condition and with knowledge of his insolvency. As guarantors they were proper parties in the foreclosure suit, for the purpose of attending the account and protecting themselves at the sale. Jarman v. Wiswall, 9 C. E. Gr. 267, 270 (Chancellor Runyon, 1873); Dorsheimer v. Rorback, 8 C. E. Gr. 46, 48; s. c. on appeal, 10 C. E.

Gr. 516, 519; United Security, &c. Co. v. Vandegrift, 6 Dick. Ch.

Rep. 400 (Vice Chancellor Van Fleet, 1893).

Under the former practice of obtaining a decree for deficiency in the foreclosure suit, no release after suit brought to collect the deficiency in the foreclosure suit would have been effective. Green v. Stone, 9 Dick. Ch. Rep. 387, 396, 399. And although the decree for deficiency cannot now be obtained in the foreclosure suit, vet the commencement of a suit for foreclosure, to which the defendants assuming the mortgages are properly made parties, as ultimately liable for deficiency, is, in my judgment, such an acceptance of their obligation and action thereon as the mortgagee is entitled to rely on as fixing his rights to enforce the covenant, and terminates the right to release by the voluntary act of the parties. After the filing of such a bill against the grantees, as having assumed the mortgage, and for the purpose of commencing the enforcement of their ultimate liability by settling finally for that purpose the amount of the debt and of the deficiency, the mortgagee is entitled to have the equities, which are relied on as a basis for discharging the release, made an issue on the record and decided by the court after hearing the parties interested, and cannot be deprived of this right by the voluntary release between the parties subsequently made. To bring an action to foreclose and claim therein for deficiency is such an adoption of the covenant by the mortgagee as terminates the right to release. 1 Jones Mort. (2d ed.) ¶ 764, and cases cited.

In my judgment the action to foreclose, which under our present practice must precede the bill for deficiency, has the same effect if the grantees liable for deficiency are made parties to the bill for the

purpose of settling the amount of their liability.

I find, therefore, that as against the complainant the releases are void and the parties are all liable, but in an order which has been affected by the releases. These, although void against complainant, are valid between the parties. Youngs v. Trustees, &c., 4 Stew. Eq. 290, 303 (Errors and Appeals, 1879). The order of liability will be, first, McChesney's executors; second, Thistle; third, Mrs. Royle; and fourth, Bray.

The unpaid taxes upon the property at the time of the sale cannot be added to the amount of the deficiency. The land was purchased subject to these taxes which were prior liens, and it must be assumed that the bid at the sale was made for the property subject to these taxes to be paid by the purchaser.

CORNING v. BURTON

CORNING v. BURTON.

SUPREME COURT, MICHIGAN, 1894.

[102 Mich. 86.]

On May 8, 1886, Burton and Ellsworth executed and HOOKER, J. delivered to Corning a promissory note for \$3,200, and secured it by a mortgage upon real estate. In October, 1887, Burton deeded an undivided half of the premises to Dickerson, the deed stating that it was subject to a mortgage of \$3,200 and accrued interest thereon, "onehalf of which encumbrance and debt said second party [i. e., Dickerson] assumes and agrees to pay." On November 10, 1887, Ellsworth deeded to Dickerson the other undivided half of the land, by a deed containing similar provisions. On July 25, 1888, said Dickerson conveyed the premises to McQueen, a similar provision in the deed requiring him to pay the mortgage mentioned. Subsequently the executors of Corning filed the bill in this cause, and obtained a decree of foreclosure and sale upon bill taken as confessed for want of appearance, under which the premises were sold by the commissioner, and the usual proceedings Burton, Ellsworth, Dickerson, and McQueen were made defendants by the bill. Under a petition for execution against them for a deficiency, Dickerson and McQueen answered, and were heard by From a denial of the prayer of this petition, complainants counsel. appeal.

We consider it unnecessary to discuss at length the proposition that a personal decree may be rendered in a foreclosure case against a grantee of the mortgager, who has accepted a deed stating that it is subject to the mortgage, which the grantee assumes and agrees to pay. It is settled by repeated decisions in this State and in New York, from which State we borrowed the statute (How. Stat. § 6704) which authorizes it. Such decisions will be found collected in the note to section 6704. Just such a decree was rendered in this case by a court having full jurisdiction of the subject-matter and the parties, from which decree

defendants did not choose to appeal.

But, if that decree should be thought not conclusive, we have no doubt of the defendant Dickerson's liability upon this record. It is claimed that by his deed to McQueen upon his undertaking to pay he was released from liability. But we think otherwise. When Dickerson bought the premises, a part of the consideration was his promise to pay this mortgage. His grantors had, and still have, a right to require him to perform that promise, just as much as the mortgagee has the right to say that the mortgagors are still indebted to him, notwithstanding their sale of the land upon the promise that another would pay the debt. The sale to McQueen does not deprive any one not a party to it of rights then existing against Dickerson. Doubtless equity would say that McQueen was primarily liable, Dickerson next, and the mortgagors

last; but all are liable. To hold otherwise would be to say that Dickerson could escape his personal liability, and compel the mortgagors to pay, by deeding to an impecunious person who should assume the debt.

The decree of the Circuit Court will be reversed, and one entered here in accordance with the prayer of the petition, with costs of both courts.¹

The other justices concurred.

GEORGE v. ANDREWS and WIFE.

COURT OF APPEALS, MARYLAND, 1882.

[60 Md. 26.2]

IRVING, J. The mortgage of Meredith for \$4,000 on the North Avenue property, given to George in 1871, and assumed by Andrews and wife in the exchange, fell due on the 16th of October, 1873. An extension for two years was then granted to him until October, 1875. Guest & Son as the agents of the appellant so informed Meredith by letter on the 14th of July, 1875, when he informs him of the terms on which his extension will be granted. That extension could not have been given by George to Andrews and wife on the North Avenue property without the knowledge that they had acquired the property from Meredith and had assumed its payment. Besides all this, the interest notes from the date of exchange were given respectively by Andrews and wife on the Meredith debt and mortgage on the North Avenue property, and by Meredith on the Andrews debt and mortgage on the Calvert Street property; which notes being to the appellant and collected by him or for him, he must be regarded as understanding the arrangement, and to have acted in the matter with respect to the extensions of time for payment, with the knowledge of the consequences flowing therefrom.

In 1 Jones on Mortgages, secs. 740-741, the doctrine is most clearly stated, that, generally one purchasing land subject to mortgage not only purchases the equity of redemption, but purchases the whole estate, and assumes the payment of the mortgage as part of the purchase-money. Generally an express agreement is made to that effect (as was done here), and the deed drawn subject to the payment of the mortgage. In such case as between the parties, the purchaser becomes primarily liable for the debt and the mortgagor only security; "and as between them the mortgaged property becomes the primary fund for the payment of the debt." The same author says the mortgagee may by his dealings with the purchaser and mortgagor recog-

¹ Accord: Enos v. Sanger, 96 Wis. 150. - ED.

² This case is abridged. — ED.

nize the purchaser as principal and the mortgagor as only security towards himself. It is also stated, that "any material alteration of the mortgage contract will discharge the mortgagor." It is still further stated in sec. 742, thus: "A purchaser having assumed the payment of an existing mortgage and thereby become the principal debtor, and the mortgagor a surety of the debt merely, an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it."

The doctrine as thus stated, comports, we think, with true principles of equity and fair dealing to which parties ought always to be held. The question was presented in Calvo v. Davis et al., 73 N. Y. 215, and was unequivocally decided in accordance with the rule as we have extracted it from Jones on Mortgages. In that case the court said, that in such a case as this we are considering, it must be held on the authorities that the rights of parties must be determined by the rules governing the relation of principal and surety. We find that decision to have been frequently followed in New York, and have discovered no case to the contrary in this country, except Corbett v. Waterman, 11 Iowa, 86. The weight of authority is strongly in favor of the rule laid down in Calvo v. Davis, which we think adopts the truly equitable rule. It is very clear that after this arrangement between the appellant and Meredith, if Andrews and wife, who were the original debtors, had tendered the amount of the mortgage debt to the appellant and demanded an immediate assignment to them that they might enforce immediate payment, Meredith could not have complied, so as to enable them to proceed; nor could he have proceeded at once upon the demand of the appellees as the sureties of Meredith under the theory of the law as stated, for he had bound himself to wait for a definite period. It may be possible that during that period such depreciation might take place as to create the deficiency.

The appellant complains that no injury in fact has been shown. The authority we have cited says that no inquiry will be made into that. The reason is that the law presumes a man to have been injured by such dealing to his possible, if not probable, prejudice. This is the doctrine of Claggett et al. v. Salmon, 5 G. & J., 352, in which Judge Stephen says: "It is upon the principle that the contract is changed or varied to his prejudice, and without his consent, that the surety is discharged. It is because the creditor has disabled himself from fulfilling the duties and obligations which he owes to the surety that he is released from his responsibility." In that case there was an express reservation of rights as against the surety, which under the circumstances of that case was upheld. But in this case there was no reservation of rights as against the surety, nor of right to proceed at the sureties' request, to throw any doubt upon the propriety of applying the general rule to this case. The doctrine that

any dealing with the principal debtor whereby the contract is varied or changed, operates to release the surety, is also fully maintained and applied in Mayhew v. Boyd, 5 Md. 102; Yates v. Donaldson, 5 Md. 389; and Oberndorff, Trustee v. Union Bank of Baltimore, 31 Md. 126.

METZ v. TODD.

SUPREME COURT, MICHIGAN, 1877.

[36 Mich. 473.]

COOLEY, C. J. This is a foreclosure suit. The mortgage was given by defendants Helen G. Todd and Alice M. Terry, to secure the payment of four promissory notes made by third persons, and which the mortgagors had delivered to complainants on a purchase of the land mortgaged. The bill avers that the four notes were delivered to the complainants "as security for the payment of the purchase price," and that the mortgage was taken at the same time to secure the payment of the notes. It is claimed by the defence that the notes were received in payment for the land, and that the purchasers were not to be looked to for payment except upon the mortgage and according to its conditions. The evidence satisfies us that this defence is well founded.

It is also claimed on the part of the defence that on the only note now remaining unpaid, and which was made by one Frink, the mortgages, for a consideration paid to them, and without the knowledge of the mortgagors, extended the time of payment. The mortgagors then insist that, though not personally at any time liable as sureties, yet as owners of the mortgaged land they occupied that position, and consequently the extension granted to the principal debtor, without their consent, discharged the land from the mortgage lien. That the claim is well founded if the proof establishes the extension, we think is undoubted. Niemcewicz v. Gahn, 3 Paige, 614, and Gahn v. Niemcewicz, 11 Wend. 312; Christner v. Brown, 16 Iowa, 130. We also find the facts to be in accordance with the theory of the defence.

The decree must be affirmed, with costs.

The other justices concurred.

¹ Accord: Union Ins. Co. v. Hanford, 143 U. S. 187; Union Works v. Caswell, 48 Kan. 689; Dedrick v. Blyker, 85 Mich. 475; Nelson v. Brown, 140 Mo. 580; Merriam v. Miles, 54 Neb. 566; Schroeder v. Kinney, 15 Utah, 462.—ED.

MURRAY v. MARSHALL.

MURRAY v. MARSHALL.

COURT OF APPEALS, NEW YORK, 1884.

[94 N. Y. 611.]

FINCH, J. The trial court held, that the extension by plaintiffs' testator of the time of payment of defendant's bond and mortgage, by a valid agreement with her grantee, who had taken a deed subject to the mortgage but without assuming its payment, operated to discharge the defendant wholly from liability. This conclusion rested upon the rule applicable to principal and surety, which forbids the former to change the essential terms of the contract without the consent of the latter. except at the peril of the surety's complete discharge. these cases the courts have refused to enter upon the inquiry whether the surety was damaged or not by the change, and the justification of such refusal ordinarily lies in the fact that the surety is bound only by the contract which he made, and not by the new and substituted one which alone can be legally enforced. Ducker v. Rapp, 67 N. Y. 473. But the present is not a case of principal and surety in the strict and technical definition of such relation; and upon that fact the General Term founded a different view of the rights of the parties, and reversed the decision of the Special Term on appeal. Conceding that, by the conveyance subject to the mortgage, the land became the primary fund for the payment of the mortgage debt, and that the grantor in defence of his liability on the bond had the right to pay the mortgage debt and be subrogated to the remedies of the creditor, and so could enforce payment out of the land to the extent of its value (Johnson v. Zink, 51 N. Y. 336: Flower v. Lance, 59 N. Y. 603), the General Term nevertheless held, affirming the authority of Penfield v. Goodrich (10 Hun, 41), that the mortgagor and grantor was all the time the principal debtor, and the grantee only became such when he covenanted to pay the mortgage debt and assumed it as a personal liability. We do not approve of this conclusion, or the result to which it leads, and deem it our duty to affirm the decision of the Special Term, although not approving the doctrine upon which it rests, except with some necessary qualification.

While, as we have said, no strict and technical relation of principal and surety arose between the mortgagor and his grantee from the conveyance subject to the mortgage, and equity did arise which could not be taken from the mortgagor without his consent, and which bears a very close resemblance to the equitable right of a surety, the terms of whose contract have been modified. We cannot accurately denominate the grantee a principal debtor, since he owes no debt, and is not personally a debtor at all, and yet, since the land is the primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value in exoneration of the bond,

it is not inaccurate to say that as grantee, and in respect to the land, and to the extent of its value, he stands in the relation of a principal debtor, and to the same extent the grantor has the equities of a surety. This follows inevitably from the right of subrogation which inheres in the original contract of sale and conveyance. It is a definite and recognized right, which, in the absence of an express agreement, will be founded upon one implied. Gans v. Thieme, 93 N. Y. 232. When the mortgagor in this case sold expressly subject to the mortgage, remaining liable upon his bond, he had a right as against his grantee to require that the land should first be exhausted in the payment of the debt. Presumably the amount of the mortgage was deducted from the purchase-price, or at least the transfer was made and accepted in view of the mortgage lien. Seller and buyer both acted upon the understanding that the land bound for the debt should pay the debt as far as it would go, and their contract necessarily implied that agreement. Through the right of subrogation the vendor could secure his safety, and that right could not be invaded with impunity. It was invaded. When the creditor extended the time of payment by a valid agreement with the grantee, he at once, for the time being, took away the vendor's original right of subrogation. He suspended its operation beyond the terms of the mortgage. He put upon the mortgagor a new risk not contemplated, and never consented to. The value of the land, and so the amount to go in exoneration of the bond, might prove to be very much less at the end of the extended period than at the original maturity of the debt, and the latter might be increased by an accumulation of interest. The creditor had no right thus to modify or destroy the original right of subrogation. What he did was a conscious violation of this right, for the fact that he dealt with the grantee for an extension of the mortgage shows that he knew of the conveyance, and that it left the land bound in the hands of the grantee. Knowing this, he is chargeable with knowledge of the mortgagor's equitable rights, and meddled with them at his peril. does not follow that the vendor was thereby wholly discharged. grantee stood in the quasi relation of principal debtor only in respect to the land as the primary fund, and to the extent of the value of the land. If that value was less than the mortgage debt, as to the balance he owed no duty or obligation whatever, and as to that the mortgagor stood to the end, as he was at the beginning, the sole principal debtor. From any such balance he was not discharged, and as to that no right of his was in any manner disturbed. The measure of his injury was his right of subrogation, and that necessarily was bounded by the value of the land. The extension of time, therefore, operated to discharge him only to the extent of that value. At the moment of the extension his right of subrogation was taken away, and at that moment he was discharged to the extent of the value of the land, since the extension barred his recourse to it, and once discharged he could not again be made liable. From that moment the risk of future depreciation fellupon the creditor who by the extension practically took the land as his sole security to the extent of its then value, and assumed the risk of getting that value out of it in the future. But the Special Term went further and held that the mortgagor was absolutely discharged by the extension. That might or might not be, and depended upon the question whether the value of the land equalled or fell below the debt. For conceding the general rule that the surety is discharged utterly by a valid extension of the time of payment, and that the mortgagor etands in the position and has the rights of a surety, it must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land; and beyond that is still principal debtor without any remaining equities.

In this case the evidence is not before us. We have only the pleadings and the findings of the court. They do not show directly that the value of the land at the date of the extension equalled the mortgage debt. But two things go far to justify such an inference. No claim that the value was less, and that the surety was only partially discharged, appears to have been made on the trial. There was no request for such a finding, and the case seems to have been heard on the assumption that the value equalled the amount of the mortgage debt. very significant fact is found by the trial court. The grantee obtained the extension complained of by paying upon the mortgage the sum of \$500 of principal and \$87 of accrued interest. He was under no obligation to make this payment or procure the extension. unexplainable except upon the theory that he deemed the land worth more than the mortgage, and that his interest was to pay off the encumbrance. It is an act which speaks as plainly as if he had said and the court had found that he had said that the land exceeded in value the amount of the mortgage. Every legitimate inference which the findings warrant, must be drawn to sustain the judgment founded upon In Kellogg v. Thompson, 66 N. Y. 88, it was said that where the evidence given on the trial was not contained in the case, we must assume not only that the facts proved were sufficient to sustain the findings, but also any additional findings necessary to sustain the conclusion of law not in conflict with the affirmative facts found. in the present case, the value of the land equalled the amount of the mortgage debt, is a fair inference from the facts which were found, is strengthened by the course of the trial so far as the absence of any such objection is concerned, and under the rule to which we have referred must be assumed in support of the judgment of the Special Term.

The judgment of the General Term should be reversed and that of the Special Term affirmed with costs.

All concur.

Judgment accordingly.1

¹ Accord: Keller v. Ashford, 133 U. S. 610; Chitton v. Brooks, 72 Md. 554; Travers v. Dorr, 60 Minn. 173.— Ed.

NORWOOD v. DE HART.

COURT OF CHANCERY, NEW JERSEY, 1879.

[30 N. J. Eq. 412.]

THE CHANCELLOR. This suit is brought to obtain a decree against the defendants for the amount remaining unpaid upon a decree in favor of the complainants in a suit for foreclosure of mortgage upon premises which were owned by the defendants respectively, at different times, subject to the mortgage. The mortgaged premises were sold under the execution issued on the decree in that suit, and were purchased by the holder of a mortgage prior to that of the complainants', for a sum less than the amount due on his mortgage, so that nothing was realized by the complainants on their mortgage.

The bill states that the complainants' mortgage, which is for \$2,000 and interest, was given by Charles Meyenberg, on or about the 20th of July, 1869; that the prior mortgage, which was for \$2,000 and interest, was given in 1868, by Frank Hunkley; that in May, 1871, one Nicholas Pflaum, then being the owner of the mortgaged premises, and both of the mortgages being subsisting liens thereon for the full amount of the principal thereof, conveyed the property to De Hart, for the consideration of \$10,000, as stated in the deed; that the deed contained the declaration and acknowledgment that the conveyance was made subject to the mortgages, and that the principal thereof was computed as part of the purchase-money, and contained, also, the stipulation that the existence of the mortgages should not be held to work a breach of any of the covenants in the deed; that in August. 1871, De Hart conveyed the premises to Benjamin Sire expressly subject to those mortgages and a subsequent one for \$1,000 and interest, which had been given thereon by De Hart; that the deed to Sire contained the declaration that the principal of those mortgages was computed as so much of the purchase-money of the property; that in September, 1871, Sire conveyed the property to Moses H. Williams, expressly subject to the three mortgages, and Williams therein assumed the payment of them; that Williams afterwards died, and the executors of his will, in March, 1873, conveyed their right, title, and interest in and to the property, to De Hart, subject to the three mortgages, the payment of which he thereby assumed; that subsequently, in December, 1873, De Hart sold and conveyed all his interest in the premises to the defendant Genung, subject, as stated in the deed, to the encumbrance of two mortgages, the principal of which amounted to \$4,000, the payment of which Genung thereby expressly assumed; and that, in January, 1872, the complainants' testator began the above-mentioned suit for foreclosure, which resulted as before stated.

The complainants' claim to a decree against the defendants rests on the ground that the creditor is entitled to the benefit of all the collateral securities which the debtor has obtained to re-enforce the primary obligation. Klapworth v. Dressler, 2 Beas. 62. But a mortgagee cannot avail himself of an assumption to pay his mortgage contained in a deed to a subsequent purchaser, unless the grantor was himself personally liable to pay the debt. Crowell v. Hospital of St. Barnabas, 12 C. E. Gr. 650, 656; King v. Whitely, 10 Paige, 465; Trotter v. Hughes, 12 N. Y. 74. In this case, it does not appear, from the bill, that De Hart's grantor, Pflaum, was personally liable for the payment of the complainants' mortgage. It, therefore, does not appear (giving to the acknowledgment contained in the conveyance from Pflaum to De Hart, that the mortgage debt was allowed as part of the consideration of the conveyance, all the effect which, under the decision of this court in Tichenor v. Dodd, 3 Gr. Ch. 454, it would have as between grantor and grantee) that there has ever existed any obligation, on the part of De Hart, to indemnify Pflaum against the complainants' mortgage debt. And this consideration is equally fatal to the claim made under the assumption contained in the deed from the executors of Williams, for it does not appear that they were liable to indemnify their grantor. Each grantee who assumed the payment of the mortgages was bound thereby only to indemnify, and if no liability to pay the mortgage debt existed on the part of his immediate grantor, there is no ground for claim of indemnity on the part of the grantor, and, consequently, no personal liability on the part of the grantee to pay the mortgage debt.

The fact that it does not appear that Pflaum was personally liable to pay the mortgage debt, is fatal to the claim of the complainants

against the demurrant.

² This case is abridged. — ED.

The demurrer will be sustained, with costs.1

GARNSEY v. ROGERS.

COURT OF APPEALS, NEW YORK, 1892.

[47 N. Y. 233.²]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, reversing a judgment entered upon the report of a referee in favor of plaintiff.

On and prior to the 23d of January, 1861, the plaintiff, Lewis R. Garnsey, was the owner of two mortgages upon the premises described

Compare: Ward v. De Oca, 120 Cal. 102; Brown v. Sullivan, 43 Minn. 126; King v. Whitely, 10 Paige, 465; Y. M. C. A. v. Croft, 34 Ore. 106; Osburne v. Cabell, 77 Va. '462, accord. Dean v. Walker, 107 Ill. 541; Marble Bank v. Mesarvey, 101 Ia. 285; Coone v. Strude, 156 Mo. 262; Hare v. Murphy, 45 Neb. 809; Brown v. Maurer, 38 Oh. St. 543; Merriman v. Moore, 90 Pa. 78, contra. — ED

in the complaint, one of which was given to him directly, and the other of which he had acquired by purchase and assignment from the original mortgagee named therein. At the date above mentioned, the premises covered by these mortgages were owned by the defendant, Richard M. Hermance, who had assumed and agreed to pay them. At this time they amounted together to the sum of \$2,000, besides an accumulation of interest.

On the 23d of January, 1861, Hermance was indebted to the defendant, Harvey J. Rogers, in the sum of \$650. For the purpose of securing the payment of this sum, Hermance executed and delivered to Rogers a deed of the premises covered by the mortgages, containing a covenant on the part of Rogers that he would assume and pay the said mortgages. This deed was given, however, upon the parol condition that whenever Hermance should pay the said \$650 and interest to Rogers, the premises should be reconveyed by Rogers to Hermance.

On the 1st of August, 1866, Hermance gave to Rogers his note for \$700, and on the same day Rogers reconveyed the premises to Hermance by deed, in which Hermance covenanted to reassume and pay

these mortgages.

Upon these facts the referee found, as a conclusion of law, that in case the amount of the mortgages could not be collected from a sale of the land itself, nor from the defendant Hermance, then and in that case the defendant Rogers was liable for the same. To this conclusion the

defendant Rogers excepted.

RAPALLO, J. Was this a promise made to Hermance for the benefit of the plaintiff? I do not understand that the case of Lawrence v. Fox has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being privy neither to the contract or the consideration. To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited; and all that the case of Lawrence v. Fox decides is, that where one person loans money to another, upon his promise to pay it to a third party to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to himself from the party receiving the money. Johnson, C. J., and Denio, J., placed their votes upon the distinct ground that the contract could be regarded as having been made by the debtor as the agent of his creditor, and that the latter could ratify the contract thus made for his benefit. In Burr v. Beers (24 N. Y. 178), the amount due upon the mortgage was reserved out of the purchase-money and left in the hands of the purchaser, upon his agreement with the vendor to apply it to the payment of the mortgage The purchaser was bound to pay the whole price, but by this agreement a portion of it was set apart for the use of the mortgagee, and the purchaser undertook to pay it to the mortgagee, and no one else. No other person was entitled to receive it. That arrangement was regarded as a contract made for the benefit of the mortgagee, and it was held that he could enforce it. In that case the purchase-money was in fact a fund in the hands of the purchaser, which he had agreed to apply to the use of the mortgage creditor. In performing that agreement he would have done nothing more than to pay his own debt in the manner in which he had agreed to pay it.

But in the present case the agreement was not to apply money which the promisee delivered for the purpose, or which was due him from the promisor, to the use of a third party, but the promisor engaged to advance his own money for the purpose of protecting the property of the promisee, which advance when made would become a lien on the property of the promisee. Regarding the conveyance as a mortgage, the stipulation was in effect to advance to the promisee on the security of the property, to discharge prior liens, and was made for the benefit of the promisee only.

If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement, by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid. I do not understand any case to have gone this length. This is not the case of a trust. If the property had been conveyed to Rogers, in trust, to pay the plaintiff's claims, the legal estate would have vested in Rogers, and he would have been compelled to execute the trust. But no such trust was declared in the deed, nor could it be created by parol, as to real estate.

It must further be considered, that, where such an assumption is made on an absolute conveyance of land, it is unconditional and irrevo-The grantor cannot retract his conveyance, or the grantee his promise or undertaking; but, when contained in a mortgage, the conveyance is defeasible. The grantor reserves the right to annul it by paying his debt, and, when he does so, he discharges the agreement to pay the prior mortgage. The reservation of this right is inconsistent with the idea that the assumption by the grantee was for the benefit of the prior mortgagee; for, if it were, the grantor would have no control over the rights thus acquired by a third party. The reservation of this control by the grantor shows that the agreement was for his benefit only, and prevents its enuring to the benefit of any third party. In the present case, the control had actually been exercised, and the grantor had redeemed and resumed the enjoyment of his property, in pursuance of the condition, before this action was commenced, and the grantee had ceased to have any interest in or claim upon it.

Judgment affirmed.

3B2 BOVEY v. SMIPWHE

CHAPTER VII.

THE COMPETITION FOR THE MORTGAGE.

SECTION I. - PRIORITY.

A. Consolidation of Mortgages.

BOVEY v. SKIPWITH.

CHANCERY, 1671.

[1 Cas. in Chan. 201.]

In 1651 Sir Francis Drake made the plaintiff a security out of the manor and rectory of Waltham upon Thames. Afterwards in 1656, Drake made the defendant a security for money out of the rectory only (the defendant having no notice then of the plaintiff's security, which was for money also). Afterwards the defendant hearing of the plaintiff's security, buys in a security precedent to the plaintiff's, which one Beddingfield had both upon the manor and rectory.

- 1. Question was, Whether the plaintiff should be admitted to redeem Beddingfield's security without paying off what was due to Skipwith? And it was ruled he should not. Vide Marsh and Lee's case.
- 2. Question was, Whether inasmuch as the defendant's security was only out of the rectory, and the security he bought in from Beddingfield was of both the manor and rectory, the defendant should make use of Beddingfield's security as to the manor after that by the profits of the manor and rectory Beddingfield's debt was satisfied? And whether then the plaintiff should not then be admitted to enjoy the manor, his security being as well of the manor as the rectory, and the defendant to hold only the rectory till he was satisfied.

Wyld and Twisden were of opinion, that after Skipwith had received what was due on Beddingfield's security he should receive no more profits of the manor, but the plaintiff to be let in to receive them, and the defendant only to make use of Beddingfield's security as to the rectory to protect his security of the rectory. But it was resolved and ruled, that the defendant should hold both the manor and rectory against the plaintiff till all due to him on both the securities was paid him.

BAXTER v. MANNING.

CHANCERY, 1684.

[1 Vern. 244.]

The plaintiff makes a mortgage of his estate to the defendant, and afterwards the mortgagee advances and lends more money unto the plaintiff, the mortgager, on his bond. The plaintiff brings his bill to redeem. The defendant insists to have his bond debt as well as the mortgage-money paid him.

PER CURIAM. Although there is no special agreement proved in this case, that the land should stand as a security for the bond debt, yet the mortgagor shall not redeem without paying both.

BRIDGEN v. CARHARTT.

CHANCERY, NEW YORK, 1824.

[Hopkin's Ch. 234.]

THE CHANCELLOR. The defendant Carhartt, being indebted to Lansing, gave him a bond for seven hundred and ninety-five dollars; and to secure the debt, Carhartt and his wife, on the twenty-first day of March, 1812, mortgaged a certain tract of land to Lansing.

Carhartt being also indebted to Thomas Bridgen, Anna M. Bridgen, and Catharine Bridgen, in the sum of one thousand three hundred and ten dollars, gave them a bond for that sum; and on the twelfth day of September, 1815, Carhartt and his wife, to secure the debt, mortgaged to them a tract of land. The interest of Anna M. Bridgen and Catharine Bridgen, in this bond and this mortgage, has been assigned to the complainant, Thomas Bridgen.

The bond and mortgage executed to Lansing have also been assigned to the complainant.

Both mortgages were duly registered.

· The lands mortgaged are two distinct tracts.

The complainant thus holding both bonds and both mortgages, has instituted this suit, to obtain satisfaction from the mortgaged lands. It appears that one of the mortgaged tracts is insufficient in value to pay the sum charged upon it; and that the other mortgaged tract exceeds in value the debt for which it is mortgaged. In these circumstances, the complainant asks the court to direct that the excess arising from the sale of one of the mortgaged tracts beyond the sum with which

that tract is charged, shall be applied to satisfy so much of the debt secured by the other mortgage as may not be raised by the sale of the other mortgaged tract.

In support of this claim, the complainant relies upon English authorities; and the following cases are cited. 1 Vern. 29, 245; 2 Vern. 207, 286; Amb. 733. To these I add, 3 Br. Rep. 162.

These cases and many others show, that where there have been two mortgages of distinct lands, and the suit has been to redeem one of them, the English chancery has refused to allow a redemption of one mortgage unless the debtor would also redeem the other. Lord Hardwicke indeed declared, in 1750, 1 Atk. 299, that he was not satisfied that this was the established rule of the court. Such, however, has been the general doctrine in England.

The doctrine of these cases does not appear to have been adopted by any decision of our own courts; but if these cases are authority here, they differ from the case now before this court.

The English cases were suits to redeem; and they were in general bills by the heir of the mortgagor. I find no instance in which distinct mortgages of different lands have been thus tacked in a suit by the mortgage creditor to foreclose.

The English authorities seem, therefore, not to support the pretension of the complainant, whose suit here is to foreclose and obtain satisfaction of the two mortgages from the lands.

But under our laws and the decisions of our own courts, a registered mortgage is regarded as an encumbrance for the debt expressed in the mortgage, and for no greater sum. Such is the sense of the act concerning mortgages; and though the great objects of the registry are to secure mortgagees, to give notice to purchasers, and to regulate priorities, it seems also to be the spirit of all our statutes respecting mortgages, that a registered mortgage shall never become a security between any parties, for any other debt than that specified in the registered instrument.

The English doctrine, by which a mortgage subsequent to a second mortgage may be tacked to the first, in exclusion of an intermediate mortgage, has been adjudged by the court of errors to be inconsistent with our law concerning registered mortgages. 1 Caines' Cases in Error, 112. The English doctrine of tacking has thus been rejected in the only adjudged case in which any attempt to enforce it appears to have been made in our courts.

This is an attempt to consolidate distinct mortgages into one security. Upon what reason can the complainant claim to blend distinct mortgages of different lands, made at different times, to secure distinct debts? Each debt is distinct; the several mortgages have no connection with each other; and each of them is a specific encumbrance. No court of justice would treat the two bonds as one contract; and the two mortgages of separate tracts of land are still more widely distinct from each other.

It is urged by the complainant, that when a mortgage is forfeited according to its letter, because payment has not been made at the stipulated time, the mortgagor must do equity before he can redeem. But what is equity between the mortgagor and the mortgagee? It is that the mortgage is still merely a security; and that the debtor is entitled to redeem by paying the principal and interest of the mortgage debt. The mortgagee, indeed, has a legal estate; but it is a legal estate only for the purpose of securing the payment of the sum expressed in the mortgage. In all other respects the mortgagor is the owner of the land; he may convey it, or it may be sold as his land, by execution at the suit of a creditor; and whether the land is held by himself or another. it is charged with the mortgage debt, and nothing more. The mortgagor being now regarded as the owner of the land, for every purpose excepting the security of the debt charged upon it; the distinction between the legal estate of the mortgagee and the equitable estate of the mortgagor serves only to determine that the remedies of the parties are given in some cases by courts of law, and in others by courts of equity. The construction of a mortgage is, as it should be, the same, in all our courts. The difference between law and equity, in respect to mortgages in this State, consists in the different remedies and forms of proceeding in the respective jurisdictions. The idea that a mortgagee may avail himself of his legal estate to obtain any advantage beyond the security of the mortgaged debt is wholly artificial, and is inconsistent with the nature of the security.

But the chief argument of the complainant is, that between the mortgage debtor and the mortgage creditor, it is just that the full amount of both debts should be paid. It is always just that a debtor should pay all his debts: but the rights of these parties result from their contract; those contracts are distinct from each other; and each contract must have effect, according to its terms and the declared intention of the parties. A mortgage to secure the payment of a sum of money is one of the most precise contracts known to our laws; and it cannot be converted into an engagement to pay a greater sum. never can be enforced for a greater sum without perverting the true sense of the contract. The claim of the creditor here to unite the two mortgages is an attempt to acquire for himself the same rights which he would have had if one mortgage of both tracts of land had been made to secure the aggregate of both debts. The debtor has made no such contract; and he cannot be subjected to the consolidation now proposed without violating the terms and sense of the mortgages in question.

The situation of the complainant in respect to the debt secured by the inadequate mortgage is that of any other mortgage creditor, where the land is of less value than the sum for which it is mortgaged. The mortgage is as it was intended to be, a specific encumbrance for the debt expressed in the instrument; and the bond binds the debtor for the whole debt, whether the land is a sufficient or an insufficient security.

The remedy of the complainant for that part of the debt which is not obtained from the land is upon the bond; and thus, both the bond and the mortgage operate according to their tenor and the intentions of the

parties.

If there is any justice in transferring a part of one of these debts to a mortgage upon which the debt was never charged by the parties, it would be equally just to charge any other debt from the same debtor to the same creditor, upon the same mortgage: and any other creditor might with equal justice claim to be satisfied from the same fund. But the debtor here is insolvent; and if the complainant should not obtain the deficiency of one mortgage, from the excess of the other, he may sustain a loss. Every other creditor of this debtor may also sustain loss by his insolvency: and if the complainant has effective security for a great part of the debts due to him, that security gives him no claim to a farther preference over other creditors.

The complainant is a purchaser of the mortgage to Lansing, and also a purchaser of two-thirds parts of the other mortgage. If these securities were held by the original mortgages, there could be no pretence for tacking them in the manner now proposed. Upon what principle has the complainant, as purchaser, better or greater rights than

those of the persons from whom he purchased?

To recapitulate:

1. The English authorities do not warrant the application of the complainant to transfer a part of one of these debts from one mortgage to the other mortgage.

2. The English doctrines of tacking mortgages are inconsistent with

our laws.

3. A consolidation of these two mortgages would essentially vary the effect of each instrument, and would be a violation of the terms and sense of the express contracts of the parties.

4. The balance of debt due to the complainant upon the deficient mortgage is not more just than any other debt due from the mortgage debtor; and as the mortgagor is indebted to other persons and insolvent, the complainant has no equitable right to be preferred to other creditors beyond the terms of his securities.

I am accordingly of opinion, that the claim of the complainant to charge one of these mortgages with more than is due upon it, in order to satisfy the other, is a pretension unsupported by equity and contrary to law.

The question of costs being afterwards moved, the court was of opinion, that as the defendant had not tendered the amount due, the complainant was entitled to costs. It is not enough to allege that he is and has been ready and willing to pay.¹

¹ Accord: Osborne v. Carr, 12 Conn. 195; Gallion v. McCaslin, 1 Blackf. 91; Thompson v. Chandler, 7 Me. 377; Henderson v. Neff, 11 S. & R. 208.— Ed.

BROOKS v BROOKS.
SUPREME COURT, MASSACHUSETTS, 1897.

Field, C. J. This is a bill to redeem certain land from a mortgage. The answer sets up that, in addition to the amount due on the note secured by the mortgage, other sums of money have been advanced by the defendant, the assignee of the mortgage, for which it was agreed that the mortgage should be held as security. The contention is that the plaintiffs should be required to pay these sums, as well as the amount due on the mortgage note, in order to redeem, or that the bill should be dismissed. There is a cross-bill, in which the same claims are made as are set up by the defendant in his answer. The case was sent to a special master "to hear the parties, with their witnesses, in the above entitled matters, find the facts, and make a report" to the court.

As the defendant has been allowed in account all the advances and payments of money for taxes made after he became the owner of the mortgage, his argument is now confined to the advances and payments of money for taxes made before his purchase of the mortgage, and to advances and payments of money made for other purposes, both before and after that purchase. The substance of the findings of the master is that, although there was no agreement that the advances and payments made by the defendant, whether made before or after his purchase of the mortgage, should be secured by the mortgage, yet there was an understanding in an indefinite way that the defendant should get his money when the plaintiffs should sell their land. Only one agreement is found, and that is the agreement of Nancy Brooks and the plaintiffs with the defendant that, if he would release lot No. 29 from the mortgage, they would pay him \$2,000 of the \$4,000 which they were to receive from a sale of the lot. the release, they sold the lot and received \$4,000, and never paid the defendant the \$2,000 promised.

The defendant relies upon Joslyn v. Wyman, 5 Allen, 62; Stone v. Lane, 10 Allen, 74; Upton v. National Bank of South Reading, 120 Mass. 153; Taft v. Stoddard, 142 Mass. 545; Douglas v. Stetson, 159 Mass. 428; and other similar cases. But the difficulty is that there never was any agreement that the mortgage should be held by the defendant as security for the advances and payments, and an indefinite understanding that the plaintiffs would repay the payments and advances when they sold the land out of the money obtained from the sale is not enough. Such an understanding, if it means anything, means that the land must be sold either discharged of the mortgage or subject to the mortgage. If the mortgage is discharged, it no longer can be held as security; if the land is sold subject to the

mortgage the purchaser takes the land subject to the mortgage, according to its terms, and it cannot be held as security for other debts unless the purchaser assents. The agreement to pay \$2,000 for the release of lot No. 29 from the mortgage out of the \$4,000 to be received from the sale, is not equivalent to an agreement that the mortgage should stand as security for \$2,000 in addition to the amount due on the mortgage note. If they had paid this \$2,000 they could have appropriated it towards the payment of what was due on the mortgage note. We have been shown no case where a mortgage given to secure the payment of a definite sum of money has been held to be security for a larger sum, on facts such as are found in the present case. The final decree of the Superior Court must be affirmed, the sixty days within which the plaintiffs may redeem to be reckoned from the day of the filing of the rescript of this court in the Superior Court, and interest on the sum to be paid to be reckoned up to the time of payment. So ordered.

FORBES v. JACKSON.

CHANCERY DIVISION, 1882.

[19 Ch. D. 615.]

Special Case. The plaintiff joined in the mortgage as surety for William Spence, A. Weir having declined to advance the £200 to W. Spence unless the plaintiff entered into the covenants and made the assignment above mentioned.

Subsequently to the 28th of December, 1854, i. e., in May, 1856, August, 1863, August, 1864, and May, 1866, William Spence borrowed sums of money amounting to £530 from A. Weir, and by four indentures charged the same premises with the payment thereof and interest. The plaintiff had no knowledge of these advances having been made until the 6th of November, 1875. William Spence paid interest on the £200 until the 28th of June, 1867, and he also paid the premiums on his policy.

A. Weir died in September, 1878, having, by his will, made in 1874, appointed three executors, the defendants Jackson and Robins being two of them, and they, in September, 1878, made a demand upon the plaintiff for arrears of interest on the £200 from the 28th of June, 1867. The plaintiff paid the arrears, and also the interest which accrued due up to the 28th of December, 1879, under the mortgage of December, 1854, and he had also paid the premiums on the policy of assurance on the life of William Spence from the

year 1868 up to the present time, and he had paid certain costs in connection with the mortgage.

HALL, V. C. The arguments which have been submitted on behalf of the executors do not affect the conclusion which I, in the course of them, intimated that I had come to; nor do they affect the principle laid down in the case of Newton v. Chorlton to which I referred on Thursday last. I consider that the decision in that case is perfectly good law, subject to this observation, that Vice Chancellor Sir W. Page Wood expressed an opinion that where an additional security is taken by the creditor after the original security was given and the contract of suretyship entered into the right of the surety as regards the securities given to the principal creditor did not extend to the additional securities. The Vice Chancellor did not think that the cases went so far as to give a surety the benefit of the security subsequently taken by the creditor. But that is a view which never commended itself to me, and it was certainly not adopted by Lord Justice Knight Bruce and Lord Justice Turner in a case before them of Lake v. Brutton, 8 D. M. & G. 441, and I may observe that Vice Chancellor Sir W. Page Wood himself, in a case afterwards before him of Pledge v. Buss, Joh. 663, 668, stated that his judgment in that case had been disapproved of by those Lord Justices, although not absolutely overruled. The Vice Chancellor added: "I am as much bound to submit to their opinion as if the decision had been reversed on appeal before them." The Vice Chancellor did not mention the names of the cases to which he referred, but I may state that some twenty years ago in my copy of Mr. Johnson's reports I noted against Pledge v. Buss the case of Lake v. Brutton as being the one which the Vice Chancellor had in his mind, and there is also another case of Pearl v. Deacon, 1 De G. & J. 461, which I thought was referred to by him. That was an appeal from a decision of the late Master of the Rolls (Sir John Romilly, 24 Beav. 186). It was the case of a subsequent security; but it is not material for my purpose to consider the general question whether there has been a release, or what is the effect of taking an additional security, and then whether that additional security should be held available for the benefit of the surety. There has never been, so far as I know, any disapproval of the general principle which was laid down by the Vice Chancellor in Newton v. Chorlton, 10 Hare, 646, except so far, if at all, as the Master of the Rolls may have dealt with it in Farebrother v. Wodehouse, 23 Beav. 18, where he seems to have followed the case relied upon here of Williams v. Owen, 13 Sim. 597, which certainly, if it were law, would be an authority in favor of the executors. In the case of Newton v. Chorlton the principle laid down by Vice Chancellor Sir W. Page Wood was that a surety was to have the benefit of all securities, "whether by way of suretyship or mortgage," and he afterwards added, 10 Hare, 652: The surety has a right at any moment to every security held by the

creditor at the date of the contract - it has never vet gone beyond that; and he has further a right to say, you must always hold yourself in a position to be put in motion, at my request, against the principal debtor." I consider that the decision in Newton v. Chorlton, supra, was carried higher by the decision of the Lords Justices in Lake v. Brutton, supra, which, as I have said, the Vice Chancellor himself recognized in Pledge v. Buss, supra, and I consider the decision must be applicable to securities taken subsequently to the original mortgage. The Master of the Rolls in Farebrother v. Wodehouse, supra, appears to have followed Williams v. Owen, supra, as it applies to a subsequent security taken by the original creditor - that he could make advances to the debtor, and that they would prevail over the right of the surety. That principle is entirely at variance with the decision in Newton v. Chorlton, and it is a singular circumstance that in a subsequent case of Drew v. Lockett, 32 Beav. 499, before him, although he had followed Williams v. Owen, Lord Romilly said, Ibid. 505, "I am of opinion that a surety " who pays off the debt for which he became surety must be entitled to all the equities which the creditor whose debts he paid off could have enforced, not merely against the principal debtor, but also as against all persons claiming under him." It was odd that Lord Romilly should agree with the principle laid down in Newton v. Chorlton, and yet come to a conclusion in Farebrother v. Wodehouse which seems to be at variance with it. The principle on which Vice Chancellor Sir W. Page Wood proceeded was the same as laid down by Lord Eldon in the case of Mayhew v. Crickett, 2 Sw. 185, which I consider a leading authority, and also laid down in earlier cases: — that the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship, or as I think it is now settled, subsequently. Nor does it matter at all in principle, whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt. They have nothing to do with the surety. He is entitled to the benefit of the securities, though his payment be not made until after the time when the further advances were made by the creditor. The principle is that the surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the duty of the creditor to keep the securities intact; not to give them up or to burden them with further advances. The same principle was enunciated in the case of Duncan, Fox, & Co. v. North and South Wales Bank, 11 Ch. D. 88, where the Master of the Rolls on the hearing upon appeal from the judgment of Vice Chancellor Little, said, 11 Ch. D. 95: "It cannot be said that in every instance a surety is entitled to stand in the place of the principal creditor as regards other securities. That is true as regards securities given by the debtor, but is not true as regards securities given by co-sureties."

But here I have nothing to do with the question which was decided in that case — a question between persons alleged to be co-sureties. That case was carried to the House of Lords, and is reported in 6 App. Cas. 1. The House of Lords, though they reversed the judgment of the Court of Appeal, did not say anything which affected the principle referred to by the Master of the Rolls, and which is all that I desire to notice. I consider that the principle laid down in that case is perfectly plain and right; and also that the decision in Williams v. Owen, supra, is not law now, and cannot after the cases to which I have referred be followed. I decline to recognize it. There is another case to which I desire to refer, that of Green v. Wynn, Law Rep. 4 Ch. 204, in which there was a surety, and Lord Hatherley said, Law Rep. 4 Ch. 207, "but where there is a mortgage of course any person under a liability to pay the interest would be at liberty to redeem." I am of opinion, therefore, that the plaintiff was right in his offer to pay off the debt, and that he is entitled to have the securities, and to say that the further charges for the sums subsequently advanced are inoperative as against him. The defendants, the executors, having refused the offer made, and being wrong in insisting on retaining the securities for the subsequent advances, must pay the costs of the action.

The declaration will be that on payment to the executors of what shall be found due for principal, interest, and costs in respect of the mortgage of the 28th of December, 1854, the plaintiff is entitled to have the securities comprised in the deed transferred to him, and to hold them as securities for the repayment to him of the sums which may be paid to the executors by him. The costs of the plaintiff will be deducted from the sum which he may be required to pay, as in Wheaton v. Graham, 24 Beav. 483; but the interest will not be stopped as from the date when the offer of payment was made.

DREW v. LOCKETT.

CHANCERY, 1863.

[32 Beav. 499.]

THE MASTER OF THE ROLLS. The question is, whether the plaintiff and the parties claiming under the settlement of the 26th of April. 1853, have a right to be paid the £394 3s. 8d. out of Lockett's share, in priority of Sworder, the transferee of the second mortgage of the 26th of August, 1852.

The general right of a surety to stand in the place of the creditor. who has been paid off, is not disputed; Lancaster v. Evors, 10 Beav. 154, and many other cases establish it, and the general right is not questioned. But, on behalf of the defendant Sworder, it is insisted that this right is confined to the right as between the original creditor and the principal debtor, and that it does not extend to the case where subsequent encumbrances have been made by the principal, so as to deprive such subsequent encumbrancers of their security, and that as, in this case, on the 26th August, 1853, Lockett mortgaged his undivided two-fifths, subject to the mortgage to Evans, to Miss Charsley. to secure a sum of £728, which mortgage is vested in the defendant Mr. Sworder, who acted as solicitor for the lady in that transaction, he is entitled to have that paid out of the two-fifths belonging to Lockett, against all persons except the mortgagee Evans, and the authorities which are relied on for this purpose are Williams v. Owen, 13 Sim. 597; Bowker v. Bull, 1 Sim. (N. s.) 29; and Farebrother v. Wodehouse, 23 Beav. 18, before me.

But I am of opinion that none of these cases establish the proposition that would be necessary in order to maintain the contention of the defendant. In the first place, all question of absence of notice of the first encumbrance and any right which might flow from being a purchaser for value without notice may be disregarded in the present case. such questions arise here; the prior mortgage to Evans was well known to the subsequent mortgagees, and it was subject to that charge that the subsequent mortgages were created. The utmost that any of those cases have gone appears to me to be this: - that as the surety knew that if the mortgagee, the payment of whose debt he guaranteed, advanced any further money to the mortgagor on the security of the same property, he would be entitled to tack the second mortgage to the former, and that he could not be compelled to reconvey the property until both mortgages were satisfied, so the surety cannot insist on interposing between the two securities, and put himself in a better situation than the person for whom he became surety. That he cannot insist on being a first mortgagee before the second mortgagee, if he tender the money sufficient to pay off the first mortgage, and thus endeavor to exclude the second charge created in favor of the original creditor. The validity of these decisions is not now the question before me, but they stand on a separate ground, and it is to be observed that this right of a first mortgagee to tack further advances is a matter which the surety might prevent by a stipulation in his original contract, that his suretyship for the first charge should cease and determine in case he, the mortgagee, should advance further sums on the security of the same property without the consent of the surety. But even this exception from the rule can only apply in cases where the first mortgagee has made his subsequent advance in ignorance of any other charge having been made by the mortgagor on the same property in favor of any other In other words, it is only in cases where the first mortgagee

could tack his subsequent advance to his first mortgage that he could apply this exception to the doctrine. But if, after the mortgage, for the payment of which the surety is bound, the mortgagor should obtain money from another person on the security of the first mortgaged hereditaments, and if notice of that second mortgage should be given to the first mortgagee, then no further advance made by him to the mortgagor could be tacked on to his first mortgage, nor could the right of the surety to stand in the place of the first mortgagee, in respect of his first mortgage when paid off, be contested, in case the surety advanced any money for that purpose, unless, in the solitary case, where the first mortgagee advanced further money on the same security, without knowledge or notice of any charge prior to his second advance.

Lam of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor, whose debts he paid off, could have enforced, not merely against the principal debtor, but also as against all persons claiming under him. It is to be observed, that the second and any subsequent mortgagee is in no respect prejudiced by the enforcement of this equity; when he advances his money he knows perfectly well that there is a prior charge on the property, and if he thinks fit to advance his money on such security, it is his own affair, and he cannot afterwards with justice complain. The amount being limited, it is a matter of indifference to him whether the first mortgagee or the surety is the prior claimant for that amount, and it would be, in my opinion, a violation of all principle if, when the surety pays off the debt, he were not to be entitled, as against the principal debtor and those who claim under him, to be paid the full amount due to him.

In this case both Miss Charsley and the defendant Sworder knew that the two-fifths of Lockett's were mortgaged for £2,000 and interest; it was subject to that charge that they advanced this money; but now the defendant Sworder seeks to make out that the charge is £394, less than that sum; nay more, for the defendant, who is consistent and logical in his contention, accordingly insists, that the plaintiff ought to contribute one-half of the first mortgage debt, as if she had originally received one-half of the money advanced by Evans. In this case, suppose the plaintiff to have paid off Evans and to have taken a transfer of his mortgage securities, it is plain that no conveyance or release could have been obtained from her until she was repaid the full amount of the debt due to her in respect of Evans' mortgage. The legal estate vested in Sworder in the unsold portion of the mortgaged hereditaments cannot, in my opinion, avail him; he cannot thereby convert his mortgage, which was subject to the £2,000 and interest included in the first charge, into a charge having priority over that £2,000, either as against Evans or as against any person entitled to stand in his place. If he cannot as to the whole, so neither can he do so as to any portion thereof, and that is what he now seeks to do by his present contention. The case of Willoughby v. Willoughby, 1 Term Rep. 763, to which I

frequently have occasion to refer (see Sharples v. Adams, 32 Beav. 213), determines, that, in such circumstances, the legal estate does not put the person who gets it in any better situation than he stood in before. As regards all encumbrancers, of which he had notice before he advanced his money, they have priority over him, whether he has or has not got in the legal estate.

The remaining points urged by or on behalf of the defendant Mr. Sworder are equally untenable. In the 7th paragraph of his concise statement, he insists that the plaintiff did not join in the mortgage merely as surety; that she was considerably indebted to Mr. Lockett for repairs, &c., on the mortgaged property and for her maintenance, and that she joined in the mortgage to secure such moneys; and in addition to this, that a considerable portion of the mortgage money was raised for the purpose of being laid out in the repairs, &c., of which the plaintiff has had the benefit.

This is not proved, but if every word of it were true, it would not entitle Mr. Lockett, or any one claiming under him, to contest the right he admitted, when he induced the plaintiff to become surety for him to Evans, viz.: that she was to have all Evans' rights over again against him, Lockett, if she paid off Evans or any part of his debt. If Mr. Lockett has any claim against the plaintiff in respect of improvement of the property or her maintenance, he must bring that forward in the ordinary way, although, in the circumstances of this case, after the lapse of time which has occurred, it is difficult to see how such a claim could be supported; but even if supported to the fullest extent, it could not, in respect of it, give him a charge on her property, or any right to be paid out of the produce of the sale of it, unless upon a clear contract for that purpose, entered into by Miss Odell, after admitting his claim and knowing what she was about. It is not suggested that anything of the sort occurred here.

A case is also attempted to be made out by Mr. Sworder against the plaintiff of acquiescence on her part; but I am of opinion that no such case is established, nor after the settlement of her share in April, 1853, could it, even if established, be of any avail as against anything except her separate estate for life in the property settled.

I am of opinion, on the whole of this case, that the plaintiff is entitled, in this court, to the first charge on the hereditaments left unsold in March, 1856, and conveyed by Evans to Miss Charsley, exactly in the same manner as if the £394 3s. 8d. taken from the plaintiff's share of the two-fifths of the purchase-money had not been paid to Evans; as if his mortgage had not been paid off in full, but that amount was still due to him.

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B. Priority among Incumbrances.

PEACOCK v. BURT.

COURT OF CHANCERY, 1834.

[14 L. J. Ch. N. S. 33.]

M. Atkinson, in March, 1810, executed a mortgage in fee to one Cade. Further advances were afterward made; and by indenture of the 14th of May, 1814, the mortgage was transferred to, and the estate became vested in fee in John Burcham, subject to redemption on payment of £7,800 and interest.

By indenture of the 3rd and 4th of December, 1815, after reciting the mortgage to Burcham, Atkinson conveyed the same property to Thomasine Smith in fee, subject to redemption on transferring to Mrs. Smith the sum of £2,100, navy £5 per cent annuities.

It appeared, that soon after the execution of this mortgage, Mrs. Smith wrote and sent to Mr. Burcham, the first mortgagee, the following letter:—

"LINCOLN, December, 1815.

"Mr. Burcham:

"Sir, — I understand you have a mortgage on the estate of M. Atkinson, of Fulbeck, for £6,000; and it being necessary that you should be informed, I have just got from him a second mortgage for £2,000, which was left to me by my late husband, Samuel Wood. If my writing to you, sir, is not sufficient, I shall esteem it a favor if you will inform me."

Burcham afterwards advanced the further sum of £900 to Atkinson, which, by an indenture of the 10th of February, 1816, he charged on the same property.

Atkinson, the mortgagor, subsequently persuaded the plaintiff, Peacock, to advance the sum of £12,000 on the security of the property, on having a transfer of Burcham's mortgage; and accordingly, by indentures of the 12th and 13th of May, 1817, and made between Burcham, Atkinson, and Peacock, in consideration of £8,700 paid by Peacock to Burcham, and of the further sum of £3,300 paid by Peacock to Atkinson, the premises were conveyed to Peacock in fee, subject to redemption on payment of the sum of £12,000 and interest; and afterwards, in 1823, Atkinson charged the property with the further sums on £1,000 and £800 to Peacock.

On a reference to the Master, it appeared that the estate was insufficient to pay all these encumbrances; and a question was then raised whether Peacock was entitled to a priority to the whole extent of his security over the mortgage to Mrs. Smith, or, whether his priority was limited to the sum of £7,812, the amount due at the time Mrs. Smith gave notice of her security to Burcham.

Peacock insisted that, having no notice of Mrs. Smith's mortgage at the time he advanced his money, and, possessing the legal estate and

the title-deeds, he was entitled to a priority for the whole of his advances over Mrs. Smith's security; and the Master reported in his favor.

To this report, Mrs. Smith took exceptions.

THE MASTER OF THE ROLLS. The question is, whether a third mortgagee, who has advanced a further sum to a mortgagor, without notice of a second mortgage, and obtains a conveyance of the legal estate from the first mortgagee, who had notice of the second mortgage, can obtain a priority over the second. It is proved in this case, that the second mortgagee gave notice to the first, but not to the third mortgagee; and I think that the real question is, whether he is or is not a purchaser for valuable consideration without notice. It is said, that though he had no personal notice, yet he is affected with the notice of the vendor; but the knowledge of a vendor has never been held to bind a purchaser for valuable consideration without notice; and against this application of the rule there is no exception. It is true, that in Mackreth v. Symmonds, Lord Eldon asks this question: "Is there any case where a third mortgagee has excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second? When the case of Maundrell v. Maundrell was before me, I looked for, but could not find such a case - that where there was bad faith on the part of the first mortgagee, that equity was applied." It appears from the report that Sir S. Romilly seems to have assented to this proposition; but the answer to the question put by Lord Eldon is to be found in those various cases which have settled, that up to the time of a decree, and pending a suit, a third mortgagee can buy up the first, and obtain a priority over the second - Marsh v. Lee. Brace v. The Duchess of Marlborough, Belchier v. Butler, Belchier v. Renforth. It is clear that these cases furnish a decisive answer to Lord Eldon's question; and, in fact, to give a third mortgagee, who has obtained the legal estate, a priority over the second, nothing further is necessary than to have advanced his money without notice of the second mortgage; and this priority may be obtained even during the pendency of a suit, for the equities of the two parties being equal. this court refuses to interfere, not because one has a better, but because they have equal rights. It appears that Mr. Powel, in the second volume of his "Treatise on Mortgages," states the same objection; and he cites Whalley v. Whalley, and Pomfret v. Lord Windsor; but it will be found, on reference to those cases, that they have no application to the point, and that they do not even contain the facts which would raise the question - and this removes the weight of the objection. Upon these authorities, independently of other considerations, the third mortgagee (who is to all intents and purposes a purchaser for valuable consideration), not having had notice, is entitled to the full benefit of his legal rights and remedies. It has been supposed that the cases of Dearle v. Hall, Loveridge v. Cooper, Foster v. Blackstone, determine the point; but, in my opinion, the decisions in

those cases proceeded on different principles; they merely decided that as between parties having equities only, he who first gives notice obtains a priority; and this is apparent when we look at the grounds on which those cases were decided. Sir Thomas Plumer proceeded on the principle that it was not possible to transfer the legal interest, but that wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it, which a court of equity considers tantamount to possession, namely, notice given to the legal denository of the fund. "The question here is," says his Honor, "not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate." So again Lord Lyndhurst, in affirming the judgment of Sir T. Plumer, states, as a reason for coming to the same conclusion, "that the act of giving the trustee notice was, in a certain degree, taking possession of the fund, and that it was going as far towards equitable possession as it was possible to go." So that those cases, so far as they apply, are very strong decisions in favor of Peacock; for they decide that a second encumbrancer, without notice, having obtained a quasi legal ' title in a chose in action, gains a priority over the prior encumbrancer: here Peacock has the actual legal estate. Those cases certainly furnish no argument against the legal right of the third encumbrancer; I therefore think, that Mrs. Smith's mortgage must be postponed to that of the plaintiff.

WING v. McDOWELL.

CHANCERY, MICHIGAN, 1843

[Walker Ch. 175.]

BILL of foreclosure.

The Chancellor. The rights of the parties are the same now as before the agreement was entered into between McDowell and Lawrence, to cancel the Tuthill mortgage, and give one running directly to Lawrence, in its place. All parties had notice of the \$3,000 mortgage to Simmons, before the change was made; and what has taken place since cannot affect his rights.

It is said McDowell might have sold, or mortgaged, his contract, but that he had no interest in the land itself, to mortgage, the title being in Lawrence. At law, a contract for the purchase of land gives the vendee no interest in the land; but the rule is otherwise in equity, which considers the vendor, as to the land, a trustee for the purchaser, and the vendee, as to the money, a trustee for the seller. In equity, the land belongs to the vendee, and may be sold, devised, or encumbered by him, and, on his death, will descend to his heirs. Seton v.

Slade, 7 Ves. R. 265, 274, 6 Ves. R. 353; Champion v. Brown, 6 J. C. R. 398. It must be taken, however, subject to the rights of the vendor under the contract. And, McDowell having an equitable interest in the land under the contract, the mortgage from him to Simmons was an equitable mortgage of that equitable interest.

This mortgage was recorded on the day it was executed, and it is insisted that the registry of it was notice, to both Tuthill and Lawrence in their subsequent dealings with McDowell, and with each other The registry of a deed or conveyance required by law to be recorded, when properly registered, is notice to subsequent purchasers of the existence and contents of such deed or conveyance, in equity, as well as at law. If an instrument should be registered, which the law does not require to be registered, the record of it would be notice to no one; for, no person is expected, much less bound, to examine the registry for that which has no business to be there. Our registry law, it seems to me, has reference to conveyances of the legal estate, or interest in law, only, except where a trust is created, or declared, in writing, which, to be notice to subsequent purchasers, the statute requires to ba The language of the statute is: "No bargain and sale, or other like conveyance of any estate in fee simple, or for life, and no lease for more than seven years from the making thereof, shall be valid and effectual against any other person than the grantor, and his heirs and devisees, and persons having actual notice thereof, unless it is made by a deed recorded as provided in this chapter." R. S. 260. In Parkist v. Alexander, 1 J. C. R. 397, Chancellor Kent thought the better opinion was, that the registry of an equitable mortgage was notice to a subsequent purchaser of the legal estate. His opinion in that case, however, was based on the peculiar phraseology of the registry act itself. He says: "The statute I have cited speaks of any 'writing in the nature of a mortgage,' and these words may reach to any agreement creating an equitable encumbrance." The language of our statute is not so broad, and the case of Parkist v. Alexander, consequently, is no authority that the registry of a mere equitable mortgage, like the one to Simmons, is, under our statute, notice to subsequent purchasers.

The mortgage to Tuthill stood on the same footing with that to Simmons, with this difference, that Simmons's mortgage was prior in time. They were both liens on McDowell's equitable interest in the land, and neither of them was an assignment of the bond for a deed by way of mortgage. Neither Simmons nor Tuthill acquired any legal interest in the bond; neither could have sued Lawrence for a breach of its condition; their interest was purely equitable, not legal, and their remedy against Lawrence, as well as McDowell, such as could be had in a court of equity only. What then were the relative rights of Simmons and Tuthill, under their respective mortgages? The rule in equity on this point is well expressed by Chancellor Walworth, in Grimstone v. Carter, 3 Paige R. 436. He says: "It is the settled

doctrine of the court that, when the equities of the parties are equal, and neither has the legal title, the one who has the prior equity must prevail. Nor will the court permit the party having the subsequent equity to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity." As between these two mortgages, then, Simmons's mortgage, being prior in time, was prior in right; and this priority was not destroyed, or lost by the assignment of the Tuthill mortgage to Lawrence without notice of the prior mortgage. Tuthill had no notice of the mortgage to Simmons, when he took his mortgage; and an assignment of it to a third person, without notice, could not give the assignee a better right than Tuthill himself had. Lawrence acquired the right of Tuthill, and nothing more. There was not a union of the legal estate and a subsequent equity in the same right, for Lawrence held the legal title in trust for McDowell; and, before the agreement was consummated to cancel the Tuthill mortgage and give another in its place, when he acquired the legal estate in his own right, both he and Wing had notice of the Simmons mortgage. The English doctrine of tacking, which, perhaps, would be applicable to such a case, has not been adopted in this country. 1 Caines Ca. 112; 3 Pick. R. 50; 1 Hopk. R. 234; 4 Kent Com. 178, 179.

The premises included in Simmons's mortgage must be sold separately, and, out of the proceeds thereof, the \$250 note given by McDowell to Lawrence for the purchase-money must first be paid (the other note having been paid), and then Simmons's mortgage for \$3,000; and, with the balance, if any, and the proceeds of the residue of the mortgaged premises, the Lawrence mortgage must then be paid, and then Simmons's second mortgage.

BIGELOW v. SCOTT.

SUPREME COURT, ALABAMA, 1903.

[33 So. Rep. 546.]

APPEAL from city court of Montgomery; A. D. SAYRE, Judge. Suit by Elizabeth A. Bigelow against Walter Henry Scott and others. From a decree for defendants, plaintiff appeals. Affirmed.

Prior to April, 1899, one Henry M. Frank purchased and had conveyed to him a certain piece of real estate lying in the city of Montgomery, Ala., and on the 22d day of April, 1899, he and his wife, Mollie Frank, executed a mortgage thereon to one Mrs. P. N. Tyson to secure a loan made by her to said Henry M. Frank. On July 25,

1899, the appellees here, Walter Henry Scott and William J. Scott. filed a bill in the city court of Montgomery, in equity, against the said Henry and Mollie Frank, seeking to have declared in their favor a resulting trust in said land. Relief was granted as prayed, and all right and title of said Franks was by decree rendered on the 27th day of May, 1901, devested out of them, and a deed to complainants Scott ordered. Subsequent to the filing of said bill by the Scotts, and prior to a decree therein - that is, on the 15th of May, 1900 - said Franks borrowed from one Gay a sum of money, which was so borrowed and loaned on the express understanding and agreement that with the money loaned the said mortgage to said P. N. Tyson should be paid. and it was in fact so used. To secure the loan a mortgage was executed by the Franks to Gay on the said property above referred to. Afterwards, on February 13, 1901, the said Franks borrowed a sum of money from the appellant in this case, Mrs. Elizabeth A. Bigelow. and to secure the same executed to her the mortgage mentioned in this bill, and this loan was made and obtained for the express purpose of relieving the said land from the encumbrance of the Gav mortgage, and out of the proceeds of this loan they paid to said Gay the debt secured by the mortgage held by him. Appellees, W. H. Scott and W. J. Scott, filed the bill in this case to have the mortgage to Mrs. Bigelow cancelled as a cloud on their title. By cross-bill Mrs. Bigelow asked that she be subrogated to the lien of said mortgage to Tyson, or be treated as an equitable assignee thereof, and that it be foreclosed for her benefit. The lower court sustained demurrers to her cross-bill, and dismissed it as wanting in equity, and rendered a final decree granting to the complainants the relief prayed.

McClellan, C. J. Franks had the legal title to certain land. Scotts were the equitable owners of it, having the equity to compel a conveyance from Franks as upon a resulting trust. Franks mortgaged the land to Mrs. Tysón to secure money presently borrowed. Mrs. Tyson had no notice of the Scotts' equity. After this the Scotts filed their bill to enforce the trust in their favor. While this bill was pending, Franks borrowed money from Gay to pay off the Tyson mortgage, and the money was so used, said mortgage being formally discharged and satisfied; and executed to Gay a mortgage on the land to secure this loan. Some time after this, and while the Scotts' said bill was still pending, Franks borrowed money from Mrs. Bigelow, and to secure the same executed to her a mortgage on this land. This loan was made and obtained for the purpose of securing money to pay off the said Gay mortgage, and out of the money so borrowed Franks paid to Gay the debt secured by the above-mentioned mortgage to him. Assuming that Gay made the loan to Franks in contemplation of the Tyson mortgage and for the purpose of Franks' applying the money so loaned in payment of that mortgage, and that it was so applied, and that mortgage thereby discharged, Gay, his own mortgage being inoperative against the Scotts because he took it lis pendens, would, for the security and reimbursement of his loan to Franks, so applied to the discharge of the valid Tyson mortgage, be entitled to subrogation to the lien of the last-mentioned mortgage under the doctrine of equitable assignments; the theory being that, having paid off the existing mortgage at the request of the mortgagor in just expectation that he would have like security for his money, he, though without previous interest in the land, is not a mere stranger and volunteer in respect of such payment, but had a right to intervene as he did, and is entitled to avail himself of the lien of the Tyson mortgage which he has discharged. Bolman v. Lohman, 74 Ala. 507; Faulk v. Calloway, 123 Ala. 325, 26 South. 504; Scott v. Mortgage Co., 127 Ala. 161, 28 South. 709; Tait v. Mortgage Co., 132 Ala. 193, 31 South. 623. But we know of no case which would extend A the right of subrogation to the lien of the Tyson mortgage to Mrs. Bigelow, nor, in our opinion, can it be extended upon sound principle. She did not pay off that mortgage, nor did she lend money to Franks with which to pay it off, nor was it paid off with her money. She paid off the Gay mortgage only, and that was inoperative against the equity of the Scotts. It is true that Gay, as an incident to the circumstances under which his mortgage was taken, had a right of action in equity to be subrogated to the Tyson mortgage, which he paid off - a right to have the chancery court decree an assignment of the lien of that mortgage to him; but his right was not secured by the Gay mortgage, and it was not in the contemplation of Mrs. Bigelow when she paid the Gay mortgage. She did not know of its existence. She could have had no expectation of succeeding to this mere cause of action in Gay. She did not pay Gay for it, and take it over, if that were possible. She was an utter stranger to this right, a stranger to the Tyson mortgage, and she in no way connects herself with it. If in any sense it can be said that her money in fact discharged Gay's right of action to enforce subrogation to the Tyson mortgage, the discharge was effected without and beyond intention on her part or on the part of Gay or Franks, and she would still be a stranger to it, just as Gay would have been had he made the loan of money to Franks without reference to that mortgage. On the facts of the case, we concur with the judge of the city court that Mrs. Bigelow's mortgage was without efficacy against the equity of the Scotts, and that, equity having drawn to it the legal title by virtue of the decree on the bill of the Scotts against Franks, the Scotts are entitled to have the mortgage cancelled as a cloud on their title.

Affirmed. Gompone: Fyre v Burmester, 10 H. L. C. 90. — Ed.

WOOSTER v. CAVENDER.

SUPREME COURT, ARKANSAS, 1891.

[54 Ark. 153.]

King mortgaged to Wooster property on which he had given a prior mortgage to Cavender & Greer. The latter, subsequently and without knowledge of Wooster's intervening lien, released their lien and took a new mortgage thereon for the same debt. This suit was brought to restore the priority of the first mortgage. From a decree granting this relief, defendants, Wooster & King, have appealed.

HEMINGWAY, J. The appellees released the lien of a prior mortgage and took a second mortgage to secure their debt. They were ignorant that an intermediate mortgage, covering the same property, had been made to the appellant. They would not have released their prior mortgage if they had known of the one intermediate. The evidence discloses that they acted in good faith without culpable negligence. The appellant made some advances under his mortgage, before the second mortgage of the appellees was executed, and while their first mortgage appeared upon the records as a paramount lien; as to those advances he understood at the time that they had the paramount lien. He made further advances after the first mortgage appeared satisfied of record, but with full notice that it was satisfied only by the execution of the second; and he could not have been misled by such record satisfaction, nor have believed that the appellees intended to postpone their lien to his. As the appellees acted in good faith and without culpable neglect under a mistake as to a material fact, it is within the ordinary powers of a court of equity to grant them relief, provided it can be done without working hardship or injustice to innocent parties. 1 Story, Eq., sec. 110; 2 Pom. Eq., sec. 849.

In cases in all respects like the present, courts of equity have extended their aid and restored the lien of the satisfied mortgage; such action, we think, is sustained by correct principle as well as by the authority of adjudged cases. Bruse v. Nelson, 35 Ia. 157; Hutchinson v. Swartsweller, 31 N. J. Eq. 205; Cobb v. Dyer, 69 Me. 494; Campbell v. Trotter, 100 Ill. 281; Jones on Mortg., sec. 971; Corey v. Alderman, 46 Mich. 540; Young v. Shauer, 35 N. W. Rep. 629; Robinson v. Sampson, 23 Me. 388; Geib v. Reynolds, 35 Minn. 331.

The judgment is affirmed on

GIRARD TRUST COMPANY v. BAIRD.

SUPREME COURT, PENNSYLVANIA, 1905.

[212 Pa. St. 41.]

BILL in equity to determine priorities of lien.

Exceptions to adjudication.

The facts appear by the opinion of the Supreme Court.

Errors assigned were in dismissing exceptions to adjudication.

Opinion by Mr. JUSTICE MESTREZAT, May 8, 1905:

Joseph F. Tobias was the equitable owner of an undivided 169/800 part of certain real estate in Philadelphia, known as the "Old Oaks" property, the legal title to which was in W. H. Jenks. rowed money from the Fidelity Trust Company, the Girard Trust Company, the plaintiff, Montagu M. W. Baird, the defendant and appellant, and from Mr. Jenks. As collateral security for these loans, he "bargained, sold, assigned and transferred" his interest in the "Old Oaks" property to each of his creditors, but none of these assignments was recorded. This bill was filed by the Girard Trust Company against Tobias, the Fidelity Trust Company, Baird and Jenks for the purpose of having determined the priorities of lien of the several assignments, and for a decree directing the sale of Tobias's interest in the property and application of the proceeds to the payment of the plaintiff's lien. The plaintiff loaned Tobias \$2,500 on August 19, 1897, and the same amount on December 18, 1897, and on each occasion took as collateral security the assignment of his interest in the "Old Oaks" property. Subsequently these loans were paid, but instead of the assignment of December 18, 1897, being returned to Tobias it was then agreed by the parties that the plaintiff should retain it to secure future loans. On December 31, 1900, the plaintiff company loaned Tobias \$7,000 for which a promissory note was given in which it was recited that he had "deposited as collateral security for the payment of this liability . . . assignment of an undivided interest of 169/800 in 'Old Oaks' property dated 12/19/97." The loan of the Fidelity Trust Company was made July 13, 1886, of Mr. Jenks, July 12, 1900, and of Mr. Baird, February 20. 1901. Accompanying each of the several loans was an assignment of Tobias's interest in the "Old Oaks" property as collateral security. The court below held that the assignments were unrecorded equitable mortgages and entered a decree that the several assignees had a lien against Tobias's interest in the "Old Oaks" property from the dates of their respective assignments, and that they were entitled to participate in the proceeds of the property according to the priority of date

of the assignments. From this decree Baird has appealed and raises the single question of the right of the plaintiff company to have priority over him in the distribution of the proceeds of the sale of the interest of Tobias in the "Old Oaks" property. The appellant contends (1) that the original loan of \$2,500 by the Girard Trust Company, secured by the assignment of December 18, 1897, having been paid off, the assignment which is conceded to be a mortgage was extinguished and could not, as against creditors of the mortgagor, be revived, and (2) that if the mortgage had any validity as a security for the loan of \$7,000 of December 31, 1900, it was only valid to the extent of its face amount, \$2,500, and not the amount of the larger loan.

We do not regard either of these positions as tenable. The appellant concedes that the several assignments made by Tobias were equitable mortgages on his undivided interest in the "Old Oaks" property, and acquiesces in the position of the court below that they have priority according to their respective dates. It is true that a mortgage paid by the mortgagor cannot be kept alive and retain its lien against subsequent mortgage and judgment creditors without But as between the parties to the instrument, the mortgage may by agreement be kept alive and be enforced against the mortgagor for the amount of the loan secured by it. In Mitchell v. Coombs, 96 Pa. 430, a mortgage was given to a bank to secure a bond which was subsequently paid by the obligor, but the mortgage was retained by the bank as security for further discounts. livering the opinion of this court, Mr. Justice Gordon says: "As to Coombs (mortgagor), his acquiescence in this arrangement (retention of mortgage to secure future advancements), would, no doubt, estop him from setting up the payment of the bond to defeat the mortgage, but as to his judgment creditors, the transaction was of no legal force. As to them the mortgage was satisfied, and no arrangement, not apparent on its face, would avail to continue its lien." Loverin v. Humboldt Safe Deposit & Trust Co., 113 Pa. 6, was, as stated by the court, an attempt to keep alive a mortgage which had been paid by the mortgagors against a subsequent unpaid mortgage given by the same mortgagors upon the same premises. Of course, this could not be done, but in delivering the opinion Mr. Justice Paxson says: "Where creditors are not concerned, there is perhaps no legal reason why it (keeping the mortgage alive) may not be done. Though actual payment discharges a judgment or other incumbrance at law, it does not discharge it in equity if there are interests which require it to be kept alive for their protection. Thus it may be kept on foot for the protection of a paying surety, and other cases which it is not necessary to name. And it was said by Sharswood, J., in Wilson v. Murphy, 1 Phila. 203, 'there is no doubt that a mortgage may be kept alive, even after payment in full, if such were the intention of the parties, and even though there be no actual assignment to a trustee."

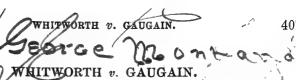
And in Massachusetts while a mortgage cannot be kept alive by an oral agreement as security for a new indebtedness, yet it is there held that if such an agreement has been made and money has been advanced in consequence thereof by the mortgage to the mortgagor, a court of equity will not aid the latter, or one claiming under him with knowledge of the facts, in obtaining a discharge of the mortgage: Joslyn v. Wyman, 87 Mass. 62; Stone v. Lane, 92 Mass. 74; Upton v. National Bank, 120 Mass. 153.

It is therefore clear, we think, that the parties to a judgment or mortgage, as between themselves, may, by agreement, continue its lien notwithstanding payment in full has been made by the debtor. There is no reason why this should not be so. It is simply permitting the parties to exercise the right of contract which they unquestionably have. And such an agreement binds not only the parties to the instrument, but also subsequent creditors with notice. It is settled that a third party with notice is bound by a contract between the mortgagor and the mortgagee to keep alive the security. Such party has no standing in law or equity to demand that his mortgage, taken with notice, shall have precedence over a prior mortgage held to secure payment of a bona fide loan. This principle is supported by authority as well as by reason. In Nice's Appeal, 54 Pa. 200, it is distinctly held that an unrecorded mortgage will avail, not only against the mortgagor, but also against his alience and mortgagee with notice. In Mellon's Appeal, 32 Pa. 121, Mr. Justice Strong speaking for the court says that notwithstanding the recording acts it has uniformly been held that an unrecorded mortgage is good as against the mortgagor, or any one claiming under him with notice. And in Britton's Appeal, 45 Pa. 172, it was held that a mortgage given for the purchase money of real estate, executed before, but not recorded until after judgments had been entered against the mortgagor, is entitled to priority over them in the distribution of the proceeds of a sheriff's sale of the land where the judgment creditors had actual knowledge of the mortgage before the debts were contracted for which the judgments were obtained. The doctrine of these authorities has been announced and enforced in many other cases decided by this court.

We are of opinion that the parties to the assignment of December 18, 1897, could agree to keep it alive in order to secure further loans, and that the assignment was valid and had priority over a subsequent assignment by Tobias taken with notice of the agreement. It was found as a fact by the court below that Baird, before making his loan to Tobias, had notice of the prior assignment to the Girard Trust Company, which was retained to secure the payment of the \$7,000 loan made in December, 1900, and hence he is not in a position to deny its priority over his assignment made in February, 1901. And we also think that the assignment retained by the plaintiff company was effective to secure the full amount of the new loan. This is on the same principle that the parties could by agreement continue its

validity to secure another loan. If the parties by contract could give the assignment life to secure another loan after the amount named in it had been paid, there is no reason why they could not at the same time stipulate the amount for which it was to remain a security. "We have no doubt," says Paxson, J., in Peirce v. Black, 105 Pa. 342, "that it is competent for the parties to a judgment, by their own agreement, to change the purposes for which it may be held." And in Atwater v. Underhill, 22 N. J. Eq. 599, Depue, J., in delivering the opinion, says: "A mortgage which has been satisfied may be given a new vitality by a redelivery by the mortgagor to the mortgagee, or a third person, upon a new consideration, or for a purpose different from that for which it was made." The original loan to Tobias was paid, and, therefore, the assignment was no longer held to secure its payment. The assignor received another sum of money from the assignee for which the parties agreed that the instrument should remain a security. Tobias, the assignor, is not seeking to invalidate his contract and is not contesting the right of the plaintiff to retain the assignment to secure the payment of the larger loan, and why should Baird with notice of the sum loaned occupy a higher ground? Why permit him to attack the validity of the contract and enable him to prevent the payment of the plaintiff's loan and thereby secure his own loan made with full knowledge of the contract and the amount of the loan the assignment secured? To permit him to do so. under the circumstances would be a fraud on the plaintiff company which, on the faith of the contract, furnished the \$7,000. A court of equity will not lend its assistance to a party to secure a fund on which another has a claim which is prior in time and of superior equity.

The decree is affirmed.



CHANCERY, 1844.

[3 Hare, 416.]

VICE CHANCELLOR. The plaintiffs, in this case, are equitable mort-gagees of one George Cooke, by a deposit of title-deeds of freehold estates, accompanied with a memorandum in writing, explaining that the purpose of the deposit was to secure a then existing debt and future advances. That memorandum is in the following words. [His Honor stated the memorandum.]

To explain the legal effect of this transaction as between the plaintiffs the mortgagees, and Cooke the mortgagor, I shall content myself with quoting the words of the Lord Chancellor of Ireland, in the case of Rolleston v. Morton: "If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge." No one, I apprehend, could seriously contend that the memorandum in writing above set forth had not the effect of charging the property as between the mortgagees and the mortgagor. It created as perfect an equitable charge as intention and act can possibly create.

The defendants, between whom and the plaintiffs the contest in the cause exists, are judgment creditors of George Cooke, whose judgments were entered up after the mortgage to the plaintiffs, and who have since, by means of elegits, obtained actual possession of the lands comprised in the mortgage; and the question between them is, which of the two is in equity to be preferred to the other? In considering that question I shall here repeat what I have on more than one occasion already said respecting Lord Cottenham's judgment when this cause was before him upon motion, namely, that I am satisfied he did not intend, by what he said, finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment creditor, he not only did not intend to decide it, but intended that it should be reserved. And I, therefore, consider myself not only at liberty, but bound to decide the cause according to my own understanding of the law.

Now, if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case, the more satisfied I feel that I stated the general principle correctly in Langton v. Horton when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the cestui que trust against the judgment creditor of the

trustee. The judgment of Lord Cottenham in Newlands v. Paynter is decisive upon that point, and the other cases cited at the bar prove the Secondly, take the case of a purchaser for value before Lodge v. Lyseley is an authority, if authority could be conveyance. wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies. or any other equitable interest, except that of an equitable mortgagee. and I apprehend the right of the equitable encumbrancer to be preferred to the judgment creditor of the debtor, in whom the legal estate in the property charged might be, will be, as indeed it properly was. admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of Williams v. Craddock, the counsel, as well as the court, were of opinion, that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants.

In the argument of this case both parties referred to, and drew conclusions from, the proposition, that in a court of equity a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, will, in equity, as at law, have a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted, by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts, and all equitable interests of every description, must be subject to the judgments against the trustee. For a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the cestui que trust; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary cestui que trust. Again, it follows, conversely, that, if the equitable interest of an ordinary cestui que trust, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments, though executed, are not analogous to purchases for value. In other words, the judgment creditor of a trustee is not a purchaser for value in the contemplation of a court of equity. The proposition, that a judgment creditor is a purchaser for value, would prove too much for the defendants' purpose. It would affect all equitable interests.

But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary cestui que trust, and other equitable interest (charges, for example, to pay debts and legacies paramount

the title of the debtor), which it was admitted would be preferred in equity, — that the interest of the equitable mortgagee was imperfect, — that of the cestui que trust perfect. In what respect is the interest of the equitable mortgagee imperfect. As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other.

I can only repeat, that it appears to me impossible, except upon the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that protection is to be afforded to the interests of an ordinary cestui que trust and other equitable interests. I do not go into the reasoning of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, — whether properly applicable to the case, or not, — no explanation I can give of the cases will at all strengthen the foundation of that judgment. I must hold that the plaintiffs have a right to the payment of their debt out of the estate, comprised in the deed. If there is any difficulty in the details of the decree, the case may be mentioned again.

TYLEE v. WEBB.
CHANCERY, 1843.
[6 Beav. 552.]

THE MASTER OF THE ROLLS. This is a bill filed by equitable mortgagees for a foreclosure of the mortgaged estate, against another equitable mortgagee, a purchaser who obtained the legal estate, and a legal mortgage under the purchaser.

In the month of December, 1829, Robert Webb, being about to purchase a copyhold estate, borrowed the sum of £150, and as a security for the repayment, gave to the plaintiffs a promissory note, and signed an agreement for the deposit, of what were called the deeds of the premises, as soon as the same should be made out and in his lawful possession.

Robert Webb, having been admitted tenant of the premises, received a copy of the Court Rolls of the manor of which the premises were held. The copy was dated the 18th of December, 1829, and on the 12th of July, 1832, he placed it in the hands of the plaintiffs, with a declaration in writing signed by him, and which was in these words:

"Bristol, July 12th, 1832.

"I do hereby declare, that the deeds annexed hereto, left in the possession of Messrs. J. and T. Tylee, are as a security for an amount of £150, which I am indebted to said firm for cash advanced, and for which, interest at 5 per cent per annum I agree to pay; and they are duly authorized to hold the same until the said amount of £150 and interest shall be fully paid.

ROBERT WEBB."

Under these circumstances, the plaintiffs became equitable mort-

gagees of the copyhold estate in question.

Robert Webb died intestate on the 13th of October, 1832, leaving the defendant, Thomas Webb, his customary heir, and, as such, entitled to the estate, subject to the plaintiffs' equitable mortgage; and on the 7th of November, 1833, Thomas Webb, as the heir of Robert, procured himself to be admitted tenant of the estate, and a new copy of Court Roll was granted to him. He paid the interest of £150 to the plaintiffs up to October, 1834; and if it be true, as has been said, that he thought he was paying interest on £150 secured by a promissory note, and was not, at first, aware of the equitable mortgage, the fact becomes immaterial, because it is proved that on the 10th of April, 1837, he had distinct notice of the mortgage. He had the legal estate, the copy of the roll showing his own admittance, and notice that the copy of the roll showing the admittance of his father, as whose heir he claimed, was in the hands of the plaintiffs as equitable mortgagees.

Thomas Webb made an attempt to sell the estate by auction in the month of July, 1837. The defendant, Mr. Hinton, was the solicitor employed to effect the sale, and his clerk Battiscombe took an active part in the business; a sale was not effected, and consequently Thomas Webb was desirous to raise an additional sum by way of loan, and Mr. Hinton was induced to lend him £50 on a deposit of a copy of Court.

Roll of his own admittance.

A question is raised, whether at the time of this advance, Mr. Hinton had, or ought to be deemed to have had, notice of the plaintiffs' equitable mortgage.

It appears by a letter which was written by Battiscombe to Kelly

(an agent of the plaintiffs) on the 30th of November, 1835, that Battiscombe then knew, from the information of Webb, that the plaintiffs had a security on the premises; and further, by a letter which was written by Battiscombe to Webb on the 19th of July, 1837, that Battiscombe then knew that the proceeds of the then intended sale were to be applied in discharge of the plaintiffs' demand, and on the occasion of Hinton's loan, Battiscombe acted not only as his agent and clerk, but also as the agent of Webb, of whom he seems to have been a particular friend; and for the security of Hinton, Battiscombe sent to Webb for his signature, a memorandum of agreement, dated the 20th of July, 1837, and which Webb afterwards signed, whereby it was stated, that Webb had deposited with Hinton, a copy of Court Roll, dated the 7th of November, 1833, stating that, at a court held on that day, he, as the only son and heir of Robert Webb, who held, by virtue of a copy of Court Roll, dated the 18th of December, 1829, the estate in question, to which Thomas Webb claimed to be entitled as only son and heir of Robert, and that he was admitted tenant of the estate, and had deposited the copy of Court Roll as security for the £50 advanced by Hinton, and interest.

It does not appear to me that the knowledge which Battiscombe possessed in November, 1835, can be imputed to Hinton in 1837, or that Battiscombe's knowledge, in July, 1837, that the proceeds of the sale were intended to be applied in discharge of the plaintiffs' demand, clearly shows, that even he, at that time, recollected or knew that which he had known in November, 1835; and though I incline to think that Hinton, who knew that Thomas Webb had been admitted only in his character of heir of Robert Webb, and that Robert Webb had been admitted under copy of Court Roll, dated the 18th of December, 1829, must be deemed to have known that Robert Webb, having that copy of Court Roll, might have deposited it so as to create an equitable charge upon the estate, and, consequently, ought to have required its production before he advanced his money, yet it does not appear to me to be necessary to determine whether Hinton had, or ought to be deemed to have had, at that time, notice of the plaintiffs' right, for I think that under the circumstances, and by mere deposit of the son's copy of Court Roll, he could take only that which Webb the son could give, which was the interest he was entitled to as his father's heir, subject to the charge which his father had made: and however this may be, it is proved that in the early part of February, 1838, Mr. Hinton had direct and distinct notice of the plaintiffs' claim; and upon the evidence which is given, I am of opinion that the other defendants, Wilson and Lloyd, must, throughout the transactions in which they are concerned, be deemed to have had all the notice of the plaintiffs' claim which Hinton had.

The estate having been sold to Wilson, whose mortgagee Lloyd is, and the purchase-money being now in the hands of Hinton, the plaintiffs have, at the bar, claimed to have the purchase-money applied, as

far as it will extend, in satisfaction of their claims, and a right to proceed to foreclose the estate, if the residue of what may be due to them shall not be paid by the defendants personally. No such claim is made by the bill, nor could it have been sustained. The plaintiffs cannot have security upon both the estate itself, and the purchase-money which represents its value.

On the other hand, it has been objected, that the plaintiffs have unnecessarily made some of the defendants parties to the cause; but considering this as a bill foreclosure, I think that every one of the defendants was a necessary party, because each of them had a right to redeem.

On the whole, I am of the opinion, that the plaintiffs are entitled to have the ordinary decree for foreclosure of the equitable mortgage to which they are entitled.

I shall make the decree, unless the parties agree to confirm the sale,

and to go against the purchase-money.

DAVEY & CO. v. WILLIAMSON, LTD. RICHARDS, CLAIMANT.

QUEEN'S BENCH DIVISION, 1898.

[1898. 2 Q. B. 194.]

THE following statement of facts is taken from the judgment of LORD RUSSELL of Killowen, C. J.:

"The defendant company (a trading company) in January, 1894, being duly authorized to do so, issued £3,000 first mortgage debentures in sixty debentures of £50 each, and six of these were held by Richards. the claimant. They were made a charge on all the property of the company, real and personal, present and future, not assured or charged by the trust deed hereinafter mentioned, and were payable on December 31, 1898, or on such earlier date as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon."

May 14. The judgment of the court (LORD RUSSELL of Killowen, C. J., and MATHEW, J.) was read by

LORD RUSSELL OF KILLOWEN, C. J. This is an appeal from the decision of His Honor Judge Paterson on an interpleader issue in which the question was whether the rights of the claimant, claiming for himself and the other holders of debentures of the defendant company

(the judgment debtors), to certain goods seized under a writ of fi. fa. by the sheriff prevailed over the rights of the plaintiffs, who were the execution creditors.

The learned county court judge held that they did not, and apparently on two grounds—(1) that the rights of the debenture-holders had not become "crystallized," the debentures not having become due, and no receiver for the debenture-holders having been appointed; and (2) that seizure of the company's goods under execution was a dealing with such goods in the ordinary course of business, and did not contravene any rights of the debenture-holders, whose securities were, in his judgment, subject to the risk of such seizure. We have to consider whether this judgment is right. [His Lordship then stated the facts as above set out, and continued:—]

In this state of things the question is, Do the rights of the debentureholders prevail against those of the executor creditor? It may seem hard upon the execution creditors that they should not be able to realize their judgment for their debt incurred in supplying trade goods for the purposes of the company's business, and that they should be met by claims of debenture-holders of which they had no knowledge or public means of knowledge, and that such debenture-holders should be allowed to claim as theirs goods in the apparent control of the company, and upon which possibly, or indeed probably, credit had been given to them. But these are matters which concern the judgment and action of Parliament. We must determine the rights of litigants in conformity with what we believe to be the law. In our judgment, the rights of the debenture-holders do in this case prevail against the execution creditors. We cannot assent to the view of the learned county court judge that a seizure under an execution on a judgment against the company is a dealing by the company in the ordinary course of business within the third condition indorsed on the debentures, so as to be within the authority given to the company by the terms of the debentures. It is not in the ordinary course of business that the debts of a going business firm or company shall be liquidated by seizure of their assets under legal process. Nor can the transaction be properly described as a dealing by the company at all. It is a compulsory legal process directed against the company - not a dealing by them.

The second ground on which the learned county court judge proceeded was that the rights of the debenture-holders had not "crystallized," or, in other words, that the moneys secured by the debentures had not become payable. As to this, it is in the first place to be observed that although this is so, yet by reason of the clause of the trust deed, previously set out, the security constituted by that deed had become enforceable by reason of the fact that an execution had been sued out against the company. But apart from this, the sheriff can only realize the judgment against the goods of the judgment debtor. Here the goods seized are validly charged with the payment of the amount of the debentures, and it is admitted that that charge far exceeds the value of

the goods in question. The rights of the execution creditors are subject, not only to the legal, but also to the equitable, rights of the debenture-holders. The sheriff cannot merely by seizing affect the rights of third persons to which property was subject when in the hands of the debtor, unless, indeed, such third persons have debarred themselves from the assertion of such rights. It follows, therefore, that there was no interest of the judgment debtor in the property seized available to satisfy the judgment debt. Nor is the debenture-holder prevented from asserting his charge upon the property in the circumstances of this case. The company as a going concern had come to an end, and although the due date of the debentures had not arrived, the holders were entitled to intervene to protect their security. Neither were they bound to apply for a receiver, or to proceed with a view to the winding-up of the company. They are entitled to say to the sheriff, "The goods seized are validly charged to us, and you cannot sell them to the prejudice of our security." No case has been cited to us, and we know of no case in which, in such circumstances as the present, the rights of the execution creditor have prevailed over those of debenture-holders.

It seems to us that this reasoning is fully supported by the authorities: see *In re* Standard Manufacturing Co., in which case the rights of the debenture-holders had not "crystallized." See also *In re* Opera, Limited. The result is that the appeal will be allowed.

Appeal allowed.

11 ine.

MERCANTILE INVESTMENT AND GENERAL TRUST CO. v. INTERNATIONAL CO. OF MEXICO.

Queen's Bench Division, 1891.

[1893 1 Ch. 484, note.]

The plaintiffs were debenture-holders in an American FRY. L. J. company, and their rights were defined, partly by the debentures themselves, and partly by a collateral deed. At the date of the resolution in question the plaintiffs, as debenture-holders, were entitled to, first, the personal obligation of the American company to pay principal and interest; and, secondly, the benefit of a mortgage of certain lands in Lower California.

The result of the resolution in question, if valid, is to extinguish both these rights, and in fact all rights against the American company and its property, and to substitute for them the rights of a preference shareholder in an English company which had been formed. The holders of the debentures would cease to have any security or any right to recover principal or interest, and would in exchange become entitled to a preferential share of the divisible profits of the new company. That new company had acquired, not only the property subjected to the mortgage of the American company, but other properties of that company not charged to the debenture-holders; and the right of the preference shareholders would be confined to a right to share in the profits of the entire company and to an interest, in case of dissolution, in its surplus assets.

Is this transaction a modification or compromise of the rights of the debenture-holders against the American company or against its If this question be answered in the affirmative, the defendants are right; if in the negative, the plaintiffs.

In my opinion, the transaction embodied in the resolution is not a modification of the rights of the debenture-holders against the company or their property; it is the extinction of all their rights against the company or its property. A right to share in profits produced by a business in which the mortgaged property may be used as a part, and part only, of the profit-producing undertaking, is not a right against that property.

Furthermore, in my opinion, this transaction is not a compromise of In our older legal language the word "compromise" appears to have been used, in accordance with its etymology, to express the mutual promises of "persons at controversy" to submit to the arbitrament of a third person the matters in dispute between the two (see "A compromise defined," 2 West Symboleography, 163). present language it undoubtedly embraces an agreement between two or more persons for the ascertainment of their rights when there is

some question in controversy between them or some difficulty in the enforcement to the uttermost farthing of the rights of the claimant. But, in my opinion, the word is applicable only where there is some such controversy or some such difficulty. Nothing of the sort existed in the present case. In my opinion, the power to compromise does not include the power to give up one chose in action, namely, a secured debenture, in exchange for another chose in action of a totally different kind, namely, a preference share, in the absence of all dispute as to the rights of the creditor, of all difficulty in enforcing those rights, and of any suggestion that the full fruits of these rights could not be obtained. Such a transaction might be described as an exchange, possibly as a barter, or an arrangement; but it is, in my opinion, not a compromise of the rights against the old company.

I have hitherto referred only to the particular language of the clause of the deed which requires interpretation. There is, in my opinion, nothing in the other parts of the deed, or in its general scope and object, to modify or extend the natural and ordinary meaning of the clause

in question.

None of the cases cited, all of which deal with very different language, appears to me to throw any light on the inquiry.

I concur in what has been said by the Lord Justice as regards the

sufficiency of the notice for the meeting.

For these reasons, I am of opinion that this appeal should be allowed, and judgment given for the plaintiffs, with costs down to and including the appeal.

POLAND V. RAULROAD CO. SUPREME COURT VERMONT, 1879.

[52 Vt. 144.]

Powers, J. On the 1st day of May, 1871, the Lamoille Valley Railroad Company, the Montpelier & St. Johnsbury Railroad Company, and the Essex County Railroad Company, associated together for the purpose of building a railroad from the Connecticut River to Lake Champlain, and known as the Vermont Division of the Portland & Odgensburg Railroad Company, in order to raise money to construct, complete, and equip their railroad, executed to Luke P. Poland and Abraham T. Lowe, as trustees, a trust deed of their railroad, including all its real and personal property, together with the tolls and income and all their corporate rights and franchises, in trust to secure the payment of \$2,300,000 in joint bonds issued by said companies, with semi-annual interest coupons attached. In the habendum it is stipulated that the conveyance is made and accepted upon trusts, and subject to limitations and conditions.

Under the sixth trust specified the trustees were empowered, after a default for six months, and on request of the holders of three fourths in amount of outstanding bonds, to take possession and sell the mortgaged premises at auction. On the 1st day of April, 1874, said companies executed a second mortgage of the same property to the same trustees, to secure the payment of joint bonds to the amount of \$1,770,000, and upon the same trusts as those expressed in said first mortgage. About \$125,000 only bonds were issued under this On the 1st day of January, 1875, said companies, jointly with the Lamoille Valley Junction Railroad Company and the Maine Division of the Portland and Ogdensburg Railroad Company, executed a third, called a consolidated mortgage of their several railroads to said Poland and Israel Washburn, Jr., and P. H. Brown, as trustees, to secure the joint bonds of all said companies, to the amount of \$9,500,000, and upon like trusts to those expressed in said first mortgage. About \$80,000 of this class of bonds were issued. The first-named three companies, having expended the proceeds of all said bonds and being insolvent, and said second and said consolidated bonds being unsalable, and the sum of \$500,000 in money being necessary to complete their railroad, on the 18th day of July, 1876, executed a fourth, called a preference mortgage of all the property, rights, tolls, and income described in said first mort-

gage to said Poland, trustee, in trust to secure the payment of \$500,000 in joint preference bonds, issued by said companies, and upon the other trusts expressed in said first mortgage. And it was provided in said last-named mortgage that no bonds should be issued under it, until the holders of first-mortgage bonds to the amount of eighteen hundred thousand dollars, should have signed an agreement in writing, in the following words, to wit: "We, whose names are hereto subscribed, holders of bonds of the numbers and amounts set against our respective names, issued under, and secured by, the first mortgage of the Essex County Railroad Company, of the Montpelier & St. Johnsbury Railroad Company, and of the Lamoille Valley Railroad Company, hereby severally agree that for the purpose of completing and equipping the line of the said several roads to Lake Champlain, in Swanton, Vt., under existing contracts or otherwise, and of paying the interest on the debts, for the payment of which a portion of such bonds are pledged, the said several railroad companies may issue bonds to be denominated preference bonds, in character like the first-mortgage bonds, to the amount of five hundred thousand dollars, secured by a joint mortgage of the several railroads and their equipment like unto the first mortgage thereof, which shall constitute and be a lien on the same prior to the bonds held by us severally, the mortgage and bonds to be made to Hon. Luke P. Poland as trustee; said preference bonds to be payable, principal and interest, in gold, in twenty years, and at the option of said companies after five years from the 1st day of May, A. D. 1876, and to bear interest at the rate of six per cent per annum semi-annually. This agreement and consent is not to be binding until the holders of the first-mortgage bonds to the amount of eighteen hundred thousand dollars shall execute the same, nor until the trustee in the preference mortgage, being one of the trustees of the first mortgage, shall consent hereto in writing; said preference bonds are not to be pledged or sold for less than their par value without the consent of said trustee, and none of said bonds are to be issued by said trustee until he is fully satisfied that the said companies have made such arrangements and contracts that the issue of said bonds will accomplish the completion of the line to Lake Champlain, and that said companies will pay the interest on the debts for the payment of which the firstmortgage bonds are pledged, for at least two years from the date of the preference bonds." And the said paper was signed by the holders of first-mortgage bonds, stating the numbers and denomination of the bonds held by each, to about the amount of eighteen hundred and seventy thousand dollars. And said Poland gave his consent as trustee thereto in writing, as provided in said agreement. in the payment of interest upon the first-mortgage bonds was made in May, 1876, and about that time upon all classes of said bonds. and October 18, 1877, this bill was brought by the trustee under said. preference mortgage, asking to have the priorities of said securities

ascertained, an account of all said bonds taken, and for a proper decree of foreclosure. The bill also alleged that the roads of said companies were very incomplete, and must soon have a very considerable expenditure of money thereon, to run with safety: that said companies were largely indebted to many persons, who were not secured upon the property, and that if said roads remained in the hands of said companies, all the earnings thereof and all the personal property would be taken for the payment of such debts and diverted from the payment of the interest due to mortgage bondholders: and that the orator, as trustee under said preference mortgage, had wholly declined to take possession of said roads and run them, as trustee, as had the trustees under the first mortgage, and that they regarded it "as simply impossible for them so to do, without the greatest peril of pecuniary loss and ruin to themselves." The bill also prayed that the court would appoint some suitable person or persons as receivers to take possession of said roads and property, and operate the same under the order and protection of the court until a final decree should be made in the premises.

The cause was heard before a chancellor, at the June Term of the Court of Chancery of Caledonia County, and a pro forma decree entered upon said cross-bill of the trustees under the first mortgage, in favor of said trustees, for a foreclosure against the trustees) and bondholders under said second and consolidated mortgages and And, in case such decree became absolute, the said companies. decree further ordered a foreclosure in favor of said trustee under the preference mortgage against said companies and such holders of first-mortgage bonds as assented to the preference bonds, unless said preference bonds be paid within a time therein limited, and further ordered that said trustee be subrogated to and hold all the right and interest of said assenting bondholders in said first mortgage, or the property covered by the decree of foreclosure upon said first mortgage, and further ordered that the cross-bill of the preferred creditors The trustees under the consolidated mortgage, J. R. be dismissed. Nichols, a non-assenting first-mortgage bondholder, and the preferred creditors appealed.

The first question presented upon this appeal is, whether the preference bonds are entitled to the priority which the parties concerned in their issue intended they should have. No one of the first-mortgage bondholders who assented to the issue of the preference mortgage by the railroad companies, and who signed the agreement above recited, dated April 7, 1876, is here objecting to the priority now claimed for the preference bonds; but they stand in court content to have the priority of the preference bonds accorded to them as agreed, and the duty of redeeming their interest in the first mortgage enjoined upon them as ordered by the decree below. The appellant Nichols claims that by the transaction resulting in the preference mortgage, the non-assenting first-mortgage bondholders

alone now hold the security of the first mortgage. The trustees under the consolidated mortgage claim substantially the same thing. The bonds issued under the first mortgage share ratably and without preference in the mortgage security. The whole amount issued was \$2,300,000. Those assenting to the preference mortgage in round numbers amount to \$1,800,000, and the non-assenting to \$500,000. The non-assenters, therefore, own five twenty-thirds of the first mortgage. Nothing can advance the fractional share of the non-assenters. except an extinguishment of the bonds of the assenters, or a cancellation of the security pledged for their payment. Neither event has transpired. The bonds are as valid now as before the execution of the agreement and the preference mortgage. The security of the first mortgage is still pledged for their payment, as before. No attempt was made - none could successfully be made - to give a priority to the preference bonds over those of the non-assenters, or, by a kind of tacking, to postpone the consolidated bonds. The assenters undertook to deal with their own bonds and security in a way to improve their value. If the assenters had pledged their bonds to A for collateral security, their ratable share of the first mortgage would go to the assignee. Leave the fact of the preference mortgage itself out of view, and suppose that the assenting first-mortgage bondholders, desiring to raise money to complete the road and thus make their security valuable, had loaned of A \$500,000, and pledged their interest in the first mortgage as security, by an instrument as informal as the agreement in question; would not a court of equity, as between the parties, treat the agreement for security as security? That is precisely the effect of this agreement. The assenters said to the preference bondholders, You lend your money to the companies to enable them to complete their road, and take their mortgage, which, as a lien upon the property, must be subject to all existing encumbrances, and we will give you, as a further security, our interest, or eighteen twenty-thirds of the first mortgage, as collateral. We will encumber that interest with the burden of your debt. agree that your bonds shall be a prior lien upon the property. there anything in this transaction prejudicial to the rights of other parties interested in the property, or anything incapable of practical enforcement in a court of equity? The preference bondholders didnot lend their money upon the mortgage by the companies of a property already hopelessly buried under the load of three existing mortgages, nor on the credit of the insolvent companies. They demanded security, and the assenters undertook to give security. There can be, then, no question as to the purpose of the agreement. The agreement is that the preference bonds shall be a lien upon the property prior to the bonds held by the assenters - not prior in time, but prior in order of payment. This agreement was incorporated into the bonds themselves and thus made them an equitable mortgage. Jones, Railroad Securities, § 75. A lien upon the prop-

erty prior to the bonds of the assenters could only be created by subordinating their lien to the new lien, that is, by mortgaging the first as security for the second. There is nothing in the estate of a mortgagee that makes such a mortgage in equity invalid or impossible. Want of form is immaterial. Equity looks only to the substance, and so moulds that into form as to work out the intent of the parties. A mere agreement to give a mortgage is treated in equity as a mort-1 Jones, Mortgages, §§ 163, 167; Jones, Railroad Securities, § 73 et seq. Even if the agreement undertakes to mortgage a thing not in esse, equity will treat the contract as a mortgage when the thing comes into being, and charge it with a lien in favor of the party intended. Jones, Railroad Securities, § 122, and numerous cases there cited. When, therefore, the decree in favor of the firstmortgage bondholders becomes absolute, the assenters will hold their interest charged with the lien agreed to be given to the preference bonds. An equitable mortgage will not be upheld which works a wrong to third parties, but where their interests are undisturbed, they are enforced for the purpose of executing the intent of the Miller v. Rutland & Washington Railroad Co., 36 Vt. 452; Jones, Railroad Securities, passim. To carry out the intent of the parties in this case works no wrong to the non-assenters, as they stand under the decree precisely as they would if no preference mortgage had been made; nor to the consolidated bondholders, as they must redeem only so much as they voluntarily assumed when they took their mortgage. The invalidity of the agreement is not urged by the party bound by it, and neither of the appellants ought to be heard to question it - much less to profit by it. By what system of logic is it established that this attempt to give security is to be held inoperative to effecutate the purpose intended, but operative to work a forfeiture of eighteen twenty-thirds of the first mortgage? What has occurred to advance the interest of the non-assenters from five twenty-thirds to twenty-three twenty-thirds of that mortgage? transaction amounts to a mortgage, or it is altogether inoperative. By it the interest of the assenters either passed in pledge or did not If it did not pass, it remains where it was lodged before, and the assenters still own their fractional share in the first mort-To say that a court of equity shall defeat the purpose of this scheme that was devised, and has been operative to make the first mortgage more valuable - the share of the non-assenters equally with the rest - and at the same time declare that by means of it the share of the non-assenters, who have paid nothing, has been magnified fourfold, is a novel proposition to advance in a court of equity. the advantage that the non-assenters can reap from the transaction is found in the increased value of their security.

The cause is remanded with mandate embodying the views herein expressed.

STEVENS v. MID-HANTS RAILWAY COMPANY.

COURT OF APPEAL, 1873.

[L. R. 8 Ch. App. 1064.]

In February, 1873, the London Financial Association, Limited, filed their bill on behalf of themselves and all other the holders of debenture stock against Stevens, against some other elegit creditors of the company, against three persons who were holders of the largest of the rent-charges granted by the company, and against the company, praying that the holders of the debenture stock of the company might be declared entitled to a charge upon the undertaking, and that such charge might be declared prior to any charge of the elegit creditors—that the persons having charges might be ascertained and their priorities determined—that Stevens might be restrained from proceeding further in his suit, and that a receiver might be appointed.

On the 11th of March, 1873, the Master of the Rolls made a decree in both suits, declaring priorities as follows: — 1. That the vendors of land were entitled to a charge on the lands sold by them respectively, by way of security for their unpaid purchase-moneys and interest in priority to all persons. 2. That the holders of rent-charges were entitled to charges on the lands out of which they respectively issued. and also to charges on the undertaking, in priority to all persons, except as above declared with respect to unpaid vendors. holders of debenture A stock issued or to be issued under the scheme were entitled to a charge on the undertaking next after the holders of the rent-charges. 4. That the holders of debenture B stock issued or to be issued under the scheme were entitled to a charge on the undertaking next after the holders of debenture A stock, and that Stevens and all other judgment creditors were entitled to take B stock under the scheme in satisfaction of their judgments. A receiver was appointed of the moneys payable by the South-Western Company, and he was directed to apply them, first, in payment of office expenses not exceeding £250 a year; secondly, in payment of interest on unpaid purchase-moneys; and thirdly, in keeping down the annual charges on the undertaking according to the priorities above declared; and the parties were to be at liberty to apply in Chambers as to the distribution of any surplus.

SIR W. M. JAMES, L. J. Mr. Stevens has filed his bill and has presented this appeal for the purpose of getting an advantage which, if he is entitled to it at all, has per incuriam, resulted to him from a scheme by which he says himself that he is not bound.

It has been established that, according to the true construction of the Act of Parliament, an outside creditor is in no way bound by the scheme. If he is not in any way bound by the scheme, he ought not to be entitled to any benefit from that scheme. He is in the position of a person who, according to my view, is not entitled to read the scheme at all for any purpose. He says, "I have nothing to do with the scheme." If he has nothing to do with the scheme, he cannot claim a benefit from it. He is entitled to say, "I shall insist upon my rights as if no such scheme had been made." His utmost right, if no such scheme had been made, would have been to have said, "When the mortgagees prior to me have been satisfied, I have a right to be satisfied." And he has now no other right unless it is given him by the scheme.

Now, how has it been given him by the scheme? The mortgagees take under it, in place of their original securities for principal and interest, perpetual rent-charges, which are legal rent-charges enforceable by certain legal proceedings, independent of a bill in this court. of opinion in this case that, if the appellant says, "I am not bound by that," the answer is, "Very well; then we will not allow anything more to be given to them than would have been given to them under the former arrangement." But he has no right to insist on having the legal rent-charges which had been given to the mortgagees in satisfaction of their legal demand postponed to him for the purpose of giving him a priority to which he was not entitled at the time when the arrangement was made between the company and their creditors. appellant relied on the cases in which, where a third mortgagee has paid off the first mortgagee, he has let in the second mortgagee simply by the neglect and carelessness of his conveyancer so as not to be entitled to retain the benefit of the first security which he has paid off, because he has, being the third encumbrancer, paid it off and let in a man who had an intermediate encumbrance. Such were the cases of Mocatta v. Murgatroyd, 1 P. Wms. 393; Toulmin v. Steere, 3 Mer. 210; and Parry v. Wright, 1 S. & S. 369; 5 Russ. 142. Those cases perhaps some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by putting in three or four lines saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off. taking the simple case of a first mortgagee converting his first mortgage into a rent-charge for ever, with power of distress and entry, I am of opinion that the cases of Mocatta v. Murgatroyd, Toulmin v. Steere, and Parry v. Wright, ought not to be extended so as to deprive that first mortgagee of the legal rent-charge which he has taken instead of his conveyance in fee, so as to let in an intermediate encumbrancer and give that intermediate encumbrancer a benefit to which he was not before entitled. Of course it is quite right that an intermediate encumbrancer should not be prejudiced by any dealings between his debtor and another encumbrancer. At the same time it is not for this court to find some recondite technical reason for giving a man a benefit at the expense of another man who was under no liability whatever to pay him.

We propose to make an order which will leave Mr. Stevens in possession of all the rights he had when the scheme was made, and that that is all he is entitled to.

W

DEARLE v. HALL.

CHANCERY, 1828.

[3 Russ. 48.]

THE LORD CHANCELLOR. The cases of Dearle v. Hall, and Loveridge v. Cooper were decided by Sir Thomas Plumer; and from his decree there is, in each of them, an appeal, which stands for judgment. As the two cases depend on the same principle, though the facts are, to a certain degree, different, the better course will be to dispose of both together; and as Dearle v. Hall was the first of the two which came before the court below, though it was not argued on appeal till after Loveridge v. Cooper had been heard, I shall first direct my attention to the facts on which it depends.

Zachariah Brown was entitled, during his life, to about £93 a year, being the interest arising from a share of the residue of his father's estate, which, in pursuance of the directions in his father's will, had been converted into money and invested in the names of the executors and trustees. Among those executors and trustees was a solicitor of the name of Unthank, who took the principal share in the management of the trust. Zachariah Brown, being in distress for money, in consideration of a sum of £204, granted to Dearle, one of the plaintiffs in the suit, an annuity of £37 a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety; and, by way of collateral security, Brown assigned to Dearle all his interest in the yearly sum of £93; but neither Dearle nor Brown gave any notice of this assignment to the trustees under the father's will.

Shortly afterwards, a similar transaction took place between Brown and the other plaintiff, Sherring, to whom an annuity of £27 a year was granted. The securities were of a similar description; and on this occasion, as on the former, no notice was given to the trustees.

These transactions took place in 1808 and 1809. The annuities were regularly paid till June, 1811; and then, for the first time, default was made in payment.

Notwithstanding this circumstance, Brown, in 1812, publicly advertised for sale his interest in the property under his father's will. Hall,

attracted by the advertisement, entered, through his solicitor, Mr. Patten, into a treaty of purchase; and it appears from the correspondence between Mr. Patten and Mr. Unthank, that the former exercised due caution in the transaction, and made every proper inquiry concerning the nature of Brown's title, the extent of any encumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to Hall of the existence of any previous assignment; and, his solicitor being satisfied, he advanced his money for the purchase of Brown's interest, and that interest was regularly assigned to him. Mr. Patten requested Unthank to join in the deed: but Mr. Unthank said, "I do not choose to join in the deed; and it is unnecessary for me to do so, because Z. Brown has an absolute right to this property, and may deal with it as he pleases." The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to Hall; and shortly afterwards Hall, for the first time, ascertained that the property had been regularly assigned in 1808 and 1809 to Dearle and to Sherring.

SIR THOMAS PLUMER was of opinion that the plaintiffs had no right to the assistance of a court of equity to enforce their claim to the property as against the defendant Hall, and that, having neglected to give the trustees notice of their assignments, and having enabled Z. Brown to commit this fraud, they could not come into this court to avail themselves of the priority of their assignments in point of time, in order to defeat the right of a person who had acted as Hall had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.

It was said that there was no authority for the decision of the Master of the Rolls - no case in point to support it; and certainly it does not appear that the precise question has ever been determined, or that it has been even brought before the court, except, perhaps, so far as it may have been discussed in an unreported case of Wright v. Lord Dorchester. But the case is not new in principle. Where personal property is assigned delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person who, in fact, is not the This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, &c.: in Ryall v. Rowles, 1 Ves. Sen. 348, 1 Atk. 165, it is expressly applied to bonds, simple contract-debts, and other choses in action. It is true that Ryall v. Rowles was a case in bankruptcy; but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, and Mr. Justice Burnett; so that the principle, on which the court there acted, must be considered as having received most authoritative sanction. nent individuals, and particularly the Lord Chief Baron and Mr. Justice Burnett, did not, in the view which they took of the question

before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Lord Chief Baron Parker says that, on the assignment of a bond debt, the bond should be delivered, and notice given to the debtor; and he adds that, with respect to simple contract-debts, for which no securities are holden, such as book-debts for instance, notice of the assignment should be given to the debtor in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. 1 Ves. Sen. 367, 2 Atk. 177. In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund: it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls.

I have alluded to a case of Wright v. Lord Dorchester, which was cited as an authority in support of the opinion of the Master of the Rolls. In that case, a person of the name of Charles Sturt was entitled to the dividends of a certain stock which stood in the names of Lord Dorchester and another trustee. In 1793, Sturt applied to Messrs. Wright and Co., bankers at Norwich, for an advance of money, and, in consideration of the moneys which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. Wright and Co. to the trustees. It would appear that Sturt afterwards applied to one of the defendants, Brown, to purchase his life-interest in the stock; Brown then made inquiry of the trustees, and they stated that they had no notice of any encumbrance on the fund: upon this B. completed the purchase, and received the dividends for upwards of six years. Messrs. Wright then filed a bill, and obtained an injunction, restraining the transfer of the fund or the payment of the dividends; but, on the answer of Brown, disclosing the facts with respect to his purchase, Lord Eldon dissolved that injunction. same time, however, that he dissolved the injunction, he dissolved it only on condition that Brown should give security to refund the money, if at the hearing the court should give judgment in favor of any of the other parties. That case was attended also with this particular circumstance, that the party who pledged the fund stated by his answer that, when he executed the security to Wright and Co., he considered that the pledge was meant to extend only to certain real For these reasons, I do not rely on the case of Wright v. Lord Dorchester as an authority; I rest on the general principle to which I have referred; and, on that principle, I am of opinion that the plaintiffs are not entitled to come into a court of equity for relief against the defendant Hall. The decree must, therefore, be affirmed, and the deposit paid to Hall.

The case of Loveridge v. Cooper, though the circumstances are somewhat different, is the same in principle with Dearle v. Hall, and must follow the same decision.

JONES v. JONES.

CHANCERY, ENGLAND, 1837.

[8 Sim. 633.]

[Brown mortgaged an estate; first, to William Jones; second, to John Jones; third, to John Harris. All in virtue of a power vested in him by his marriage settlement. John Jones had no notice of the mortgage to William Jones. John Harris had notice of the mortgage to William Jones, but not of the mortgage to John Jones; and he had caused notice of his mortgage to be indorsed on the settlement which together with the title-deeds was in the possession of William Jones.]

The Vice Chancellor, after stating the substance of the report and observing that there was no covenant for title in the deed of the 14th of January, 1826, and that the only covenants in it were for payment of the mortgage-money and interest, for quiet enjoyment free from encumbrances and for further assurance, continued thus:

To this report an exception is taken by the parties who claim under John Jones, insisting on their priority over Harris: and the question is whether the report is right.

At law the rule clearly is that different conveyances of the same tenement take effect according to their priority in time. If a man seised in fee first grants one term of years and then another term, the second termor cannot enter till the first term has ceased by effluxion of time, surrender, or otherwise. So, if freehold interests are carved out of the fee by different conveyances, the estate of the second grantee cannot take effect in possession, till the estate of the first has, in some measure, ceased. The effect of different conveyances is the same as if different successive estates were granted by the same conveyance, first in possession and then in remainder. Equity follows the law; and, where the legal estate is outstanding, conveyances of the equitable interest are construed and treated, in a court of equity, in the same manner as conveyances of the legal estate are construed and treated at law. In Beckett v. Cordley, 1 Bro. C. C. 353, which Lord Eldon notices in Ex parte Cawthorne, 1 Glyn. & Jam. 240, and in Martinez v. Cooper, 2 Russ. 214, Lord Thurlow twice decided that, where the legal estate was outstanding in a first mortgagee, of two subsequent equitable encumbrancers, he who is prior in time must be prior in equity. His words are: "The second equitable encumbrancer

¹ Compare: Ames: Cases on Trusts, pp. 326-328, notes. - Ed.

had the security he trusted to. He knew he had not the legal estate. He trusted to the honor of the borrower." In the present case, no such question arises as is noticed in Willoughby v. Willoughby. 1 T. R. 763-772, or as is noticed in Evans v. Bicknell, 6 Ves. 174-183. where Lord Eldon alludes to what fell from Mr. J. Buller in Goodtitle v. Morgan, 1 T. R. 762: for Harris, the third encumbrancer, has not got in the legal estate, nor has he any declaration of trust from the holder of it, nor has he possession of the mortgage deeds conveying the legal estate or of any other of the title-deeds. He gave notice of his encumbrance to the first mortgagee. But, according to what the present Lord Chancellor decided in Peacock v. Burt, such a notice is of no value. The fact is that, upon Harris's answer and before the Master as well as in the argument at the bar, the case of Harris was attempted to be put upon the decisions in Dearle v. Hall, Loveridge v. Cooper, and Foster v. Blackstone, decided by Sir John Leach and afterwards by the House of Lords. But, in each of those cases, the subject of discussion was a chose in action. According to what is said by Lord Lyndhurst, in Foster v. Cockerell, 3 Clark & Fin. 456, in moving to affirm the decree in Foster v. Blackstone, and according to what is said by the present Lord Chancellor, in Peacock v. Burt (p. 607 in Mr. Coote's valuable Treatise on Mortgages), one principle established by Dearle v. Hall and Loveridge v. Cooper was that, in order to complete the transfer of a chose in action, notice to the legal holder of the fund is necessary. In the former of those cases, Sir T. Plumer says: "The law of England has always been that personal property passes by delivery of possession; and it is possession which determines the apparent ownership" (3 Russ. 22), and, by way of preserving the analogy between personal chattels in possession and choses in action, he says: " Notice is necessary to perfect the title" (that is to a chose in action), "to give a complete right in rem, and not merely a right as against him who conveys his interest. Ibid 24." But what is stated, by the Lord Chancellor, in Hiern v. Mill, 13 Ves. 119, is unquestionably true: "There is a marked distinction between a real estate and a personal chattel. The latter is held by possession; a real estate by title." In Loveridge v. Cooper, Sir T. Plumer says: "It is of the utmost importance to the interests of mankind that plain and clear rules of property should be laid down, and when laid down, that they should not be frittered away by nice and frivolous distinctions." 3 Russ. 35. Broad distinctions must be preserved; and it is of the utmost importance that an equity of redemption of real estate should not be taken to be a mere equitable interest in the nature of a chose in action.

The case before me is a case of real estate, not of a chose in action. John Jones, the first encumbrancer on the equity of redemption, took his title by the conveyances of January, 1826; and notice or possession was not necessary to complete his title. Harris took his title by a subsequent conveyance, and merely gave a notice which did not and

could not affect Jones. No fraud whatever can be imputed to Jones. He made some inquiry and was misled. He was the innocent subject of fraud, and not the doer of it: and, in my opinion, the exception must be allowed.¹



DAY v. MUNSON.

Supreme Court, Ohio, 1863.

[14 Oh. St. 488.]

This action was instituted by the plaintiffs, to enforce the liens which they claim were secured to them by two mortgages upon certain chattel property, executed by the defendants, Munson & Spear, to secure cer3mutain indebtedness to them.

The Cleveland Paper Mill Company, as the assignee of T. L. Wilcox, to whom a mortgage was executed upon the same property substantially, and Younglove & Hoyt, who likewise received from said Munson & Spear a mortgage on the same property, were, among others, made parties.

The dates, times of filing and refiling, and the amounts due on each of these mortgages, on the ——day of September, 1861, as found by the District Court, are as follows:

- 1. First mortgage to the plaintiffs, dated December 12, 1857, filed **February 16, 1858; refiled March 22, 1859; amount, \$995.
- 2. Second mortgage to the plaintiffs, dated July 3, 1858, filed July 6, 1858; refiled July 7, 1859; amount, \$467.56.
- 3. Mortgage to Wilcox, dated July 6, 1858, filed July 6, 1858; refiled July 1, 1859; amount, \$54.17.
- 4. Mortgage to Younglove & Hoyt, dated October 28, 1858, filed October 28, 1858; refiled October 14, 1859; amount, \$949.75.

The pleadings and the findings of the District Court show that the Wilcox mortgage had originally been given, with full knowledge, on the part of Wilcox, of plaintiffs' mortgages, to secure the payment of \$1,000, due from Munson & Spear; that on the 30th December, 1858, Wilcox assigned said mortgage to defendant, Warren, to secure the amount then due Warren from Wilcox (which the court found, as above, to amount to \$51.17, on the —— day of September, 1861); also, to secure any future advances which Warren might make for Wilcox, or liabilities which he might incur for him. That, on the first of January, 1859, Wilcox became the purchaser of the property from Munson, subject to the above mortgages, and agreeing to pay them off, except the one to himself. That, about September, 1859, Warren made advances for Wilcox, or became liable for him to the amount,

^{· 1} Compare: Ames: Cases on Trusts, pp. 326-328, notes. — Ed.

with interest to said — day of September, 1861, of \$408.44. That the remainder of the Wilcox mortgage was, subsequent to the commencement of this suit, assigned by Warren, at the request of Wilcox, to the Lake Erie Paper Mill Company, who are now the owners of any benefit that may be derived therefrom.

The amount which may ultimately be realized from the mortgaged property is yet uncertain; but there is reason to apprehend that the proceeds of its sale will be insufficient to discharge the amount due to the plaintiffs on their two mortgages, the amount found due to Warren, as the assignee of the Wilcox mortgage, and the amount due Younglove & Hoyt under their mortgage. And with a view to the adjustment and determination of the respective priorities of these mortgagees, the questions of law arising upon the facts found by the District Court, and shown by the pleadings, have been reserved for the decision of this court.

Scott, J. The first question arising in this case is, whether by force of the statute the plaintiffs' mortgages, upon the failure to refile them within one year from the time of the first filing, became void as against Younglove & Hoyt, whose mortgage was executed and filed within the year, and who received the same without actual notice of plaintiffs' mortgages.

The fourth section of the act requiring mortgages or bills of sale of personal property to be deposited with township clerks, provides that, "Every mortgage so filed shall be void, as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage shall be again filed in the office, etc. S. & C. St. 476.

The first section of the same act provides that mortgages of goods and chattels, not accompanied by delivery, and followed by actual and continued change of possession, shall be void as against creditors, and subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited, etc.

The question in this case turns upon the proper construction and meaning of the expression "subsequent purchasers and mortgagees in good faith," as used in these sections.

It is well settled, in New York, under a statute substantially similar, and from which our own has been mainly copied, that to constitute "good faith" on the part of the subsequent mortgagee, there must be the absence of actual notice of the existence of the prior mortgage. And so it was held by this court, in Paine et al. v. Mason et al., 7 Ohio St. Rep. 198. In that case, it was also held, that constructive notice alone of the prior mortgage would not constitute mala fides on the part of the subsequent mortgagee; and that as against him, the priority

of the first mortgage could not be retained, without refiling pursuant to statute.

That decision, unless overruled, must be fatal to the claim of the plaintiffs in this case. We are accordingly asked to reconsider the question thus decided, on the ground that the court, in that case, assumed, without full consideration, that the term "subsequent" in each of these sections had relation to the same thing; that is, to the time of the execution of the mortgage declared to be void; whereas the policy of the statute requires the term "subsequent," in the fourth section of the act, to be construed as relating to the expiration of the year within which the refiling is required. And in support of this view we are referred to the case of Meach v. Patchen, 4 Kernan, 71, in which it was so held by the Court of Appeals of New York (Mitchell, J., dissenting). The decision of the majority of the court, in that case, is supported by reasoning, which is, certainly, not without force. But it is a construction given to the statute after its adoption in this State, and in opposition to the opinion expressed by Justice Cowen, in Gregory v. Thomas, 20 Wend. 19, prior to the enactment of the statute in this State. This latter opinion, it is true, was of an obiter character, but I am not aware of any New York decision to the contrary, prior to the enactment of our own statute. Subsequent decisions, which could not have been before the mind of the legislature, can throw no light on its intentions. Beside, the phraseology of the fourth section of the statute of this State differs somewhat from that of the corresponding section in the New York act, and is such that the term "subsequent," in the fourth section, cannot well be regarded as referring to any later point of time than the original filing of the mortgage. The language is, "Every mortgage so filed shall be void, as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith," etc. Subsequent to what? The phraseology would import subsequent to the making, or to the filing of the mortgage, which are the only acts previously spoken of. As the term refers clearly to the making of the mortgage in the first section. it should not, without strong reason, be differently construed in the fourth. And we think it by no means clear, that the policy of the act designed to place a mere creditor on a better footing than a bona fide mortgagee, in respect to the laches of a prior mortgagee.

Where a subsequent mortgage is taken in good faith, and without actual notice of a prior one, no satisfactory reason is perceived why the rights of its owner should depend on the fact of its date being one day before, or one day after, the laches of the first mortgagee. In either case, the statute may reasonably have intended that such laches should enure to the benefit of the specific lienholder, as well as to that of the mere creditor.

Besides, no disapprobation of the construction given to the statute, in the case of Paine v. Mason, has been indicated by any subsequent legislation; and when to this acquiescence we add the further consid-

eration, that a decision which has become known, and been acted on as an established rule of property, should not be lightly overruled, and the law be thereby rendered uncertain, we are satisfied that the former decision of this question should stand as the law of this State, until

changed by legislative authority.

The case, then, stands thus: The plaintiffs' mortgages, not having been refiled, pursuant to statute, are void as to Younglove & Hoyt. the third mortgagees; but the plaintiffs retain their priority of lien over Warren, who holds under Wilcox, the second mortgagee, and whose mortgage was taken with actual notice of the plaintiffs' prior mortgages. Warren's lien under the Wilcox mortgage has priority over that of the third mortgagees, and is not to be affected by the laches of the plaintiffs. The plaintiffs' mortgages are, then, not to affect the rights of the third mortgagees; nor is the laches of the plaintiffs to affect the rights of the second mortgagee; and whatever rights these conditions leave to the plaintiffs, they still retain. The result will be. if the fund is insufficient for the discharge of all mortgages, that the third mortgagees, Younglove & Hoyt, are entitled to so much of the fund as would be applicable on their mortgage, after satisfying Warren's prior lien. Warrren is entitled to so much of the fund as would be applicable to the satisfaction of his claim, leaving the third mortgage out of the question, and preserving the plaintiffs' priority of lien. And the plaintiffs are entitled to the residue.

The case will, therefore, be remanded to the District Court, for decree and distribution pursuant to the foregoing opinion of this court, and for such further decree as may become necessary.

BRINKERHOFF, C. J., and WILDER and WHITE, JJ., concurred. RANNEY, J., having been of counsel, did not sit in this case.

SAYRE v. HEWES.

COURT OF ERRORS, NEW JERSEY, 1881.

[33 N. J. Eq. 552.]

On the 3d of December, 1877, the appellant, Hoag, obtained a chattel mortgage on the goods in question. This mortgage was not recorded in the proper county; it was to secure \$2,150. On the 14th of February, 1878, Frederick Fisher, having knowledge of the prior mortgage, took a second mortgage on the same property to secure \$1,160. Edward Sayre holds a judgment by confession against the mortgagor for \$6,000 debt and \$4 costs, which was entered on the 27th of February, 1878. Execution on this judgment was duly taken out and levied.

BEASLEY, C. J. I agree with the Vice Chancellor in his settlement

of the disputed facts in this case, but it seems to me that an error has crept into the decree with respect to the marshalling of the encumbrances. These liens are of this character: the mortgage first in date is held by the appellant, Hoag; then comes a mortgage held by Frederick Fisher, one of the defendants, and lastly is the judgment of the defendant Sayre. This first mortgage was not recorded in the proper county, and therefore is subordinate to the judgment, but it is paramount to the second mortgage, which was taken with knowledge of the existence of this first lien. In this state of things, the decree places the judgment and the first mortgage, by way of preference, before the second mortgage. This, as it seems to me, is unjust and inadmissible.

Upon what possible principle is the result in this case to be justified? Fisher, when he took his mortgage, knew that there was an antecedent mortgage on the same property, securing the sum of \$2.150, with interest. He had his own mortgage duly recorded, so that it became incontestably the second legal lien; in this position of affairs this judgment is entered, and he at once finds himself, without any fault on his part, degraded from the position of a second encumbrancer to that of a third encumbrancer, and instead of the mortgaged property being subject to a claim prior to his own of but \$2.150. it is subject to paramount claims which amount to the sum of \$5.150. If such a principle be correct, it does not appear that any person, under any circumstances, can take a second or other subordinate mortgage on property, without putting his interests in the utmost jeopardy. Under the prevalence of such a rule of law, a subsequent encumbrancer would be obliged to see that the status of the primary encumbrance was, in all respects, unexceptionable, under penalty, if a flaw should be undetected of having his lien superseded by every judgment that might be entered at a later date. Such a rule would be as inexpedient as it would be unjust.

I cannot but think that any one who will look carefully into the subject will perceive that no rule applicable to such a juncture as this can be admissible that is not founded on the theory of leaving the second mortgagee in the position originally acquired by him, without respect to the neglects or shortcomings of the holder of the previous mortgage or the subsequent judgments of creditors. Viewed in this aspect, this would be the result: the judgment creditor would, in the marshalling of these liens, take priority over the first mortgage; as between the judgment and that mortgage, the former must be first But with respect to the second mortgage, the judgment creditor, as such, has no claim to stand first, his only claim in that regard being his right to stand in the shoes of the first mortgagee. and assert all the privileges incident to that position. But he can exact nothing further than such privileges; he can legally say that he has the paramount lien on the property to the extent of the sum secured by the first mortgage; but he cannot legally say that, with respect to the second mortgagee, he has any paramount lien beyond this. No additional burden can be put upon the land to the detriment of the second mortgagee. If the judgment be for a sum greater than that secured by the first mortgage, then, by right of representation, such judgment will constitute the first lien to the full extent, and no further, of the first mortgage; if it be for a less sum than the first mortgage, it will take precedence and consume the first mortgage to that extent only. It will be observed that by these adjustments the priority of the first mortgage, with regard to the second mortgage, will be exhausted, either partially or wholly, so that, to the extent of such exhaustion, it will be postponed to the second mortgage.

The doctrine thus propounded is but the development of the principle maintained and acted on in Clement v. Kaighn, 2 McCart. 48. In that case there was a judgment without an execution; then a mortgage, and then judgments on which executions had been taken out. These latter judgments were entitled to precedence over the first, but were subordinate to the mortgage. Chancellor Green decided that the first judgment on the mortgaged premises, by reason of the failure to sue out execution upon it, should be postponed to the encumbrance of the junior judgments, and, as an inevitable consequence, that it should be postponed to the mortgage which was prior to the junior judgments, and whose priority was not to be affected by any laches of the holder of such prior judgment.

In my opinion, the decree in this case should be modified so as to direct the payment of these encumbrances in this order, viz.: first, the judgment of Sayre to the amount secured by the first mortgage; second, the payment of the residue of such judgment and the second mortgage, pari passu, as they were concurrent liens, being entered on the same day; third, the payment of the first mortgage.

SECTION II. - MARSHALLING.

A. Exoneration from the Burden.

GWYNNE v. EDWARDS.

CHANCERY, ENGLAND, 1824.

[2 Russ. 289, note.]

JOHN BENNETT POPKIN, by deeds of lease and release, dated the 23d and 24th of October, 1782, mortgaged a freehold estate. On the 23d of December, 1782, he surrendered certain copyholds to the use of the mortgagee as a security for the same mortgage debt.

In a suit by creditors for the administration of Popkin's estate, the personalty having been exhausted, his freehold property was sold under the direction of the court, and with the consent of the mortgagee; and, out of the proceeds of the freehold estates, the mortgagee, by an order dated the 31st of July, 1822, was paid his debt of £5,119 15s. 7d.

The residue of the proceeds of the real estate was insufficient for the payment of Popkin's specialty creditors; and the only question was, whether these creditors were entitled to have the debts due to them satisfied out of the copyholds to the extent of £5,119 15s. 7d., which the mortgagee had received out of the money raised by the sale of the freeholds.

The Master of the Rolls. Aldrich v. Cooper governs this case; and the circumstance, that the mortgage of the copyholds was by a transaction distinct from and subsequent to the mortgage of the freeholds, does not constitute any solid ground of difference. Both estates were intended to be a security for the same sum: the mortgage had a right to go against either or both: and, his demand having, by the direction of the court, and as the more convenient mode of payment, been satisfied out of the freehold property, the specialty creditors are entitled to have raised, by sale of the copyholds, the sum which the mortgagee received out of the freeholds.

GIBSON v. SEAGRIM.

CHANCERY, ENGLAND, 1855.

[20 Beav. 614.]

In 1851 Charles Seagrim mortgaged certain real estate to Henry Johnson, with a power of sale, to secure £1,200. Afterwards, in 1852, Seagrim mortgaged the same estate to Godwin to secure £700, and by deed of even date transferred ten shares in the Winchester Gas Light and Coke Company, by way of additional security.

In 1853 Seagrim mortgaged all his lands, including those in the former mortgage, to the plaintiff, but the gas shares were not comprised in the security. On the 17th August, 1853, the plaintiffs instituted the present suit to realize their securities, and they registered the suit as a lis pendens, in pursuance of the act. 2 & 3 Vict. c. 11.

On the 10th October, 1853, Seagrim became bankrupt and his assig-

nees were made parties to the suit.

On the 4th November, 1853, the first mortgagees sold the real estate included in their mortgage for £1,895, and, after paying themselves, they handed over the surplus to Godwin, who applied it in part payment of his mortgage debt, and he then, on the 13 December, 1853, sold the gas shares, and, having paid himself in full, handed over the balance (being about £206 10s. 1d.) to the assignees of Seagrim. The plaintiffs claimed to have this sum applied in satisfaction of their debt, in lieu of the surplus of the proceeds of the real estate intercepted by Godwin.

THE MASTER OF THE ROLLS. I am of opinion that the two estates ought to be marshalled. I can have no doubt that if these securities had been sold by the direction of the court, and the money had been paid into court, the second mortgagee would not have been allowed to exhaust the proceeds of the real estate in paying off his charge upon it, to the injury of the plaintiffs, and then to hand over the surplus proceeds of the gas shares to the mortgagor, or to his assignees, which is the same thing, and thereby enable them to receive something to which they were not entitled. On the contrary, according to the principle laid down in the case of Baldwin v. Belcher, 3 Dru. & War. 173; Lanoy v. Duke of Athol, 2 Atk. 444; Aldrich v. Cooper, 8 Ves. 382, and that class of cases, the court will order the funds to be marshalled; but I agree with what was decided by the Vice Chancellor Knight Bruce, in Barnes v. Racster, 1 Y. & Coll. C. C. 401, that if two estates are mortgaged to A., and one is afterwards mortgaged to B., and the remaining estate is afterwards mortgaged to C., B. has no equity to throw the whole of A.'s mortgage on C.'s estate, and so destroy C.'s security. As between B. and C., A. is bound to satisfy himself the principal, interest, and costs due to him out of the two estates ratably, according to the respective values of such two estates,

and thus to leave the surplus proceeds of each estate to be applied in payment of the respective encumbrances thereon. But, in my opinion, that rule does not apply to the present case, to which a different equity is applicable.

It is obvious that there are three modes of dealing with this case; the first is, to allow the plaintiff to throw the whole of the second mortgagee's charge upon the gas shares, and make them solely available for payment; the second, to apportion the second mortgage ratably on the two properties, as was done in Barnes v. Racster; or thirdly, to let the mortgagor have the whole surplus of the produce of the gas shares after satisfying the claim of the second mortgagee. opinion, neither of these last two principles apply to this case. Here a mortgagor having mortgaged two properties to one person, and one of them to another, and the security of the latter having been exhausted by the prior mortgagee, he is entitled to say, as against the mortgagor, that his mortgage shall be thrown upon the other security, and that he is entitled to be recouped out of it.

I do not say what would have been the effect if the sale and payment over of the surplus had taken place before any suit had been instituted, but here the decree reserves the question, and the suit having been registered as a lis pendens before the sale took place, has the effect of preserving all the equities, in the same manner as if the plaintiff had taken proceedings to have the money paid into court.

I am of opinion that the plaintiff is entitled to have the £206, which is now in the hands of the assignees, applied in payment of his mortgage security, and that the second encumbrancer was bound, as between the plaintiff and the mortgagor, to apply the gas shares in the first instance towards the discharge of his debt.

I will certify accordingly.

CHANCERY, NEW YORK, 1847.

[4 Sandf. Ch. 510.] GEOXGE

o foreclose a management of the state of t The suit was brought to foreclose a mortgage, executed by Townsend to the complainants. M. L. Voorhis was a junior mortgagee. Pending the suit, the mortgagor demised a part of the premises to Mrs. Sedgwick, and the rent was made payable to the complainants' solicitor, as a further security for the debt due to them. The premises were ultimately sold on the decree in the suit, and the proceeds sufficed to

pay off the complainants, without resorting to the rent. After the sale, the mortgagor assigned the rent in question to E. Terry, Esq., to pay a debt theretofore accrued to him. The mortgage of Miss Voorhis remaining unpaid, she claimed the rent by way of substitution to the complainants' security. The tenant was ready to pay the rent, on being discharged. The matter was brought before the court on a petition and affidavits.

THE VICE CHANCELLOR. The reservation of the rent, payable to Mr. Griffin as complainants' solicitor, was equivalent to the taking of so much additional security for the mortgage debt. It was a pledge of the rent, in addition to the previous pledge of the land out of which it issued.

Thus, when the decree for the sale was made, Miss Voorhis, as the next encumbrancer, was in equity entitled, on paying the complainants' mortgage debt, to be subrogated to the rent as a portion of their security. And when, by means of the sale of the land, the complainants' whole debt was discharged without resorting to the rent, Miss Voorhis had an equity to be substituted in their place in respect of the rent; because, by their omitting to resort to the same, they had withdrawn from the proceeds of the sale \$125, which she would otherwise have received. In other words, the complainants having two funds to go upon for the \$125, on one of which Miss Voorhis had a junior lien, exhausted the latter, instead of applying the one upon which she had no lien, and she therefore became entitled to a substitution in respect of the latter. See 1 Story's Eq. Jur. § 633 to 637, and notes. rights were fixed and vested before Mr. Terry became the assignee of the lease. He received the transfer for a precedent debt; and of course, subject to all the equities respecting it which existed against his assignor, one of which was Miss Voorhis's right to be substituted in the place of the complainants.

I am satisfied that she is entitled to receive the rent; and it must be paid to her accordingly.

No costs to either party, as against the other.1

GREEN v. RAMAGE.

SUPREME COURT, OHIO, 1849.

[18 Oh. 42.]

This is a Bill in Chancery, reserved in Muskingum County.

The facts are these: Ramage had the legal title to lot No. 14, and an equitable title to lot 39, in the town of Zanesville. He conveyed by mortgage, recorded October 10, lot 14 to Wilson. He also assigned

¹ Accord: The Carrigan, 7 Fed. 507; Whitlake v. Roller Mill Co., 55 N. J. Eq. 674; Orangeburg Bk. v. Kohn, 52 S. C. 120. — Ep.

the title bond, by which he held lot 39, to Wilson to secure the same debt secured by the mortgage. He conveyed by mortgage, recorded October 21, to Green, lot 14, and to Hillier, lot 39, by mortgagor recorded October 23.

The bill is filed by Green for the purpose, among other things, of compelling Wilson to exhaust lot 39 before proceeding against the other, on which Green has a mortgage.

Caldwell, J. If there were but the two mortgages on the property, Wilson's and Green's, Green would without doubt be entitled to the relief which he claims. In Story's Equity, vol. 1, sec. 633, the rule on the subject of marshalling securities is stated thus: "The general principle is, that if one party has a lien on, or interest in two funds for a debt, and another party has a lien on, or interest in one only of the funds for another debt; the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both the parties."

In this case, however, there are three parties interested. If Green should compel Wilson to exhaust lot 39 before he comes on lot 14, then Green will have the benefit of the fund arising from lot 39, although he took no security on it. But Hillier by this arrangement will be deprived entirely of his security on lot 39, although he took a mortgage on it. We think the rule cannot be applied in a case of this kind The principle is one established for the purpose of securing to parties the rights to which, upon the principles of natural justice, they are entitled. To deprive Hillier of his security in this way would be manifestly unjust. When Green took his mortgage he had notice of the mortgage of Wilson, on lot 14. When Hillier took his mortgage on lot 39, he had notice only of the lien of Wilson, which was all the encumbrance on it. There was nothing connected with Wilson's lien that was even calculated to put him on inquiry in reference to Wilson's mortgage on lot 14, because Wilson's liens on these two lots were created by separate instruments. But if Wilson's lien on the two lots had been created by a single mortgage, Hillier was not bound to notice the situation of lot 14, having nothing to do with it. We think, then, that justice between Hillier and Green requires that each should have the full benefit of his mortgage, and this can only be done by requiring Wilson to take his debt out of the proceeds of both lots proportioned to the amount that each lot may produce. The decree will be so entered.

BARNES v. RACSTER.

CHANCERY, ENGLAND, 1842.

[1 Y. & C. C. C. 401.]

RACSTER, being seised of Foxhall Coppice and a piece of land, marked in a plan of the estate No. 32, mortgaged in 1792, Foxhall to Barnes; 1795, Foxhall to Hartwright; 1800, Foxhall and No. 32 to Barnes; 1804, Foxhall and No. 32 to Williams. The subsequent encumbrances were taken with notice of the prior encumbrances. The question was, whether, as No. 32 was sufficient to pay the whole of Barnes's demand, Hartwright could, as against Williams, compel Barnes to resort to No. 32, thereby leaving Hartwright the first encumbrancer on Foxhall.

The Vice Chancellor. Racster having two estates, one called Foxhall, and another which has been called No. 32, mortgages Foxhall alone to Barnes in 1792, and afterwards, by way of second charge, mortgages Foxhall (alone), in 1795, to Hartwright, who at the time has notice of Barnes's security. Subsequently, in 1800, Racster mortgages both No. 32 and Foxhall to Barnes to secure a further advance, and in such a manner as to make No. 32 and Foxhall liable each to the whole of Barnes's two advances, Barnes at the time having notice of Hartwright's security. After this both No. 32 and Foxhall are mortgaged by Racster, in 1804, to Williams, who at the time has notice of the former securities.

The present proceedings were commenced subsequently to the year 1804, nor until after that year was any step taken by any party for enforcing either of the securities, or obtaining payment. All the mortgages cannot be paid in full. Foxhall alone is not sufficient to pay the first charge upon it, but No. 32, without Foxhall, is sufficient to pay the whole of Barnes's demands. Hartwright, therefore, claims to throw Barnes on No. 32 exclusively. To this Barnes is indifferent; but Williams objects, contending that, as he is an encumbrancer for value, the burden of the first mortgage ought to be borne at least ratably by Foxhall and No. 32, upon which latter Hartwright never took a charge. This is the question to be decided, and I think that it may be decided without necessarily involving either of two other points to which the argument has extended itself. I mean, first, the question, what would have been the rights of Hartwright and Williams had Barnes's security upon No. 32 preceded and not been subsequent to Hartwright's security on Foxhall; and, secondly, the question, what would have been the rights of the parties had Williams's security not existed at all, or not existed until after the commencement of these proceedings. Upon each of these two points I entirely reserve myself.

As to the matter to be determined, the first observation to be made is, that, considered without any reference to Hartwright or to Williams, the nature and effect of the security of 1800 were, as I conceive, to make No. 32 and Foxhall puri passu, and ratably, according to their values, liable to Barnes's two charges. That, I think, would have been the result between the different heirs of Racster, had he died intestate and insolvent as to his personal estate, leaving one person his heir as to No. 32, and another person his heir as to Foxhall. At least the heir of Foxhall could not have claimed more against the heir of No. 32.

Taking this to be so, I am unable to see that Hartwright had in or before the year 1804 (when Williams took his security) acquired any right in No. 32, or any equity against Racster, to preclude him from dealing with it on that footing for any purpose that his necessities might require. Contract certainly, as to No. 32, Hartwright had none. It was as to him an accident, - a matter with which he had neither privity nor concern, that Racster happened in 1800 to mortgage No. 32 to Barnes. Could not Barnes and Racster at any time after 1800, as against Hartwright, have sold or mortgaged No. 32 separately to a stranger, though, with notice, leaving Foxhall charged as if it was in 1795, and leaving Hartwright in the same situation as if the security of 1800 had never existed? If Barnes and Racster could have done this as against Hartwright, why should not Racster be able as against Hartwright to do so? In my opinion, it would be more than justice to him, and less than justice to Racster, to hold that the security of 1800 rendered No. 32 to any degree, or in any respect, less available for the necessities of Racster than the rights of Barnes required. I think that Hartwright had not any equity to prevent Racster from doing what he did, namely, carrying this estate to market, and selling or pledging it as charged only according to the tenor of the security of 1800, that is, ratably and pari passu with Foxhall.

Again, suppose judgments to have been recovered by strangers in 1794, 1799, and 1801, against Racster, who was, I believe, previously to 1800, seised equitably and not otherwise of No. 32. Suppose the security of 1800 good against all these judgments; what would have been the relative rights of Hartwright and the several judgment creditors (with or without elegits) as to No. 32? Can Williams be in a worse situation than that in which he would have stood if his security had consisted of a judgment only instead of what it did? If it were conceded in the present case, that had Williams's charge not existed, the right claimed by Hartwright could now be enforced against Racster, it does not in my judgment follow that in 1804 (in the absence at the time of any suit or proceeding for applying the property in question, or otherwise relating to it) any such right had arisen. The position of Williams, who took his security with notice, has been in argument assimilated to that of the heir of Racster, or of a person claiming merely as a volunteer under him. To this comparison I am not prepared to agree. To render it just, it ought to be established either that eo instanti when Barnes took his second security, Hartwright acquired a lien on No. 32, or that it was inequitable in Racster, however much in need of money, and however fair his intentions, to use No. 32 as part of his property, unless by the consent of Hartwright, or on the condition of paying him his whole debt. I am of opinion that neither proposition can be established, and that Hartwright's title, if any, against No. 32, does not extend beyond such interest in it, as before the institution of these proceedings Racster did not alienate for value; holding, as I do, the notice to be as immaterial as notice to a purchaser of a judgment recovered against a vendor, when the latter having a power, and being seised in fee subject to the power, can make a title and alienate the fee by an exercise of that power, destroying the creditor's security.

Upon the whole, I retain the opinion which on a former occasion I expressed, that circumstanced as the present case is, Hartwright and Williams stand with regard to the matter in dispute on an equal footing; that Barnes must be paid out of the respective proceeds of No. 32, and Foxhall, pari passu, and ratably according to their amounts; that the residue of the produce of Foxhall must be applied towards paying Hartwright; and that the residue of the produce of No. 32 must be applied towards paying Williams, — a conclusion, as I consider, entirely in accordance with the principles on which Lanoy v. Dutchess of Athol, Aldrich v. Cooper, and Averall v. Wade were decided.

B. Contribution to the Burden.

GOULD v. CENTRAL TRUST CO.

SUPREME COURT, NEW YORK, 1879.

[6 Abb. N. C. 381.]

TRIAL by the court.

This action was brought by William R. Gould and another, against The Central Trust Company, Thomas S. Marlor and others, to compel the trust company to sell certain stock, which had been wrongfully hypothecated to it by John Bonner & Co.

On October 15, 1877, the plaintiffs borrowed from John Bonner & Co. \$50,000, on the security of 800 shares of Chicago & Alton Railroad stock. Soon afterwards John Bonner & Co. borrowed from The Central Trust Company \$100,000, on the security of 500 shares of the plaintiff's stock, and certain other stocks and bonds, including \$3.000 of Wabash Railway bonds, which had been pledged by the defendant, Thomas S. Marlor, and 400 shares of stock in the Bankers' & Brokers' Association, which belonged absolutely to said Bonner & Co.

¹ Accord: Flint v. Howard, 1893, 2 Ch. 54; Richards v. Cowles, 105 Ia. 734; Goreham v. McCormick, 85 Tenn. 597. — ED.

No demand of payment was ever made by said firm upon the plaintiffs, but, on January 3, 1878, the latter found that all their stock had been re-hypothecated, and were compelled to pay to the Union Bank \$21,000, to redeem 300 shares, while on January 4, The Central Trust Company sold out the 500 shares pledged to it, realizing \$38,000 therefrom, and at the same time sold other securities pledged by Bonner & Co., sufficient, with the proceeds of the plaintiff's stock, to pay all the loan made by it to Bonner & Co., and to leave a surplus of \$989.59. But the trust company did not sell Mr. Marlor's \$3,000 of Wabash bonds, nor the 400 shares of Bankers' & Brokers' Association stock.

On January 5, 1878, the plaintiffs offered to pay to John Bonner & Co. the full amount of their loan, with interest, upon condition that their stock should be returned; but this, of course, Bonner & Co. refused to do. The plaintiffs then requested The Central Trust Company to sell the other securities remaining in its hands, so as to increase the surplus in which the plaintiffs would be entitled to share, but this the trust company refused to do.

This action was brought to compel the trust company to do this, so that the loss might be apportioned between the owners of all the securities originally pledged.

Van Vorst, J. The claim of the plaintiffs is reasonable and just, and in arguing that the Central Trust Company, under the circumstances of this case, should have proceeded pari passu, in the application of the securities deposited with it by Bonner & Co., as collateral security to the loans made to them, so that what loss should be occasioned to the parties whose stock and bonds Bonner & Co. wrongfully pledged to it shall fall on them ratably, they contend only for what equity approves. Had they known of the rights and claims of the plaintiffs and Marlor, at the time they sold, they should have so proceeded.

This is but an application of the principle of natural justice, which requires every one to exercise his rights in a way not to occasion loss to others, which might be avoided without inconvenience to himself.

The principle contended for by the learned counsel for the plaintiff is fundamental in equity, and is well sustained by the numerous and well-selected authorities which he has been careful to cite.

The securities of the plaintiffs and the defendant Marlor, in the hands of the trust company, originally stood upon equal footing, and should be regarded equally by the company. The complete interest of one real owner should not be spared at the expense of the other. Neither by a partial election, or intentional discrimination on the part of the pledgee, shall either party be disappointed.

Had the attention of the trust company been in season called to the rights of the parties claiming to own the stock and bonds, it would have been inequitable to proceed to sell the property of one exclusively, and satisfy its claims thereout, with an idea that it could in that way relieve the property of the other wholly from the burden of the loan

made to Bonner & Co. That would be to throw the loss entirely on

one party.

But that it has, in this manner, without notice of the claims of the real owners, proceeded to sell the securities of one of them, has not placed it beyond the power of this court to intervene, and, even now, order to be done what equity requires. It may be that the pledgees were under no duty, and would not have been originally justified to sell more of the securities than was sufficient to satisfy its claims, but that would not relieve the unsold security from the burden of contribution.

I do not think the defendant Marlor should now be allowed to say, this "is a lucky hit." The Central Trust Company has satisfied its whole claim out of the plaintiff's stock, and my property, although equally pledged, shall be free.

The stock of the defendant Marlor is still in the hands of the trust company, and relief may yet be granted on principles applicable to marshalling assets. Aldrich v. Cooper, 8 Ves. 308; Exp. Alston, L. R. 4 Ch. 168; Story Eq. Jur. § 638; Broadbent v. Barlow, 3 De G., F. & J. 570; Cheeseborough v. Millard, 1 Johns. Ch. 409, 413.

Plaintiffs are also, as is well urged by their counsel, entitled to relief arising from the relation of suretyship between them and the defendant Marlor, for through their stock and bonds pledged by Bonner & Co. to the trust company, they were to that extent, in substance, sureties for the debt, and are interested upon conditions, with rights of subrogation with all its incidents. Delaware & Hudson Canal Company's Appeal, 2 Wright, 512, 516; see also Barnes v. Mott, 64 N. Y. 397, which was applied in Green v. Milbank, 3 Abb. New Cas. 138, 155. The rule of general average, in maritime law, is founded upon the same general principle.

The plaintiffs, being in ignorance as to with whom Bonner & Co. had pledged their stock, were unable to give notice in season to prevent a sale, or adequately protect themselves, but that does not defeat their right of subrogation, and to subject the defendant's bonds, even now, to their just proportion of a common burden. Nor is it a good answer to plaintiffs' claim, that Bonner & Co. had wrongfully pledged the defendant's bonds; he had done the same with the plaintiffs' stock. The title of the trust company, who was a bona fide holder, attached to all the securities alike, and it is through such legal title and claim, as it originally existed, that the plaintiffs are entitled to relief.

And it must be adjudged that the Wabash bonds, and the Bankers' and Brokers' Association stock, still in the hands of the trust company, should be sold, and that the proceeds should be divided between the plaintiffs and the defendant Marlor, according to their interests, and in such proportions as is equitable, with reference to the amount realized on the sale of the plaintiffs' stock, which has already been made, and the total proceeds of the sale now ordered to be made.

Under the facts of the case, I do not think that the assignees of

Bonner & Co. are entitled to any of the proceeds. The stock and bonds did not belong to that bankrupt firm, and were pledged in fraud of the rights of the true owners.

The claims of the Brokers' and Bankers' Association, who are not parties to the action, cannot be now determined, and if they have any claim or right, they are not to be prejudiced by the judgment to be entered herein.

McBRIDE v. POTTER-LOVELL COMPANY.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1897.

[169 Mass. 7.]

ALLEN, J. The Potter-Lovell Company, a corporation, held certain notes of the plaintiffs for sale, and it was to remit to them the proceeds, less its commissions for selling the same. The Potter-Lovell Company also held notes of others of the defendants, which it had received from them for sale. Instead of selling the above mentioned notes for the benefit of the several makers, the company at different times wrongfully and fraudulently pledged all of them to the Second National Bank as security for its own debts to said bank, all the notes being pledged for the same debts. The bank, being a bona fide holder for value without notice, collected enough of these notes from time to time as they fell due, including the notes of the plaintiffs and some others, to satisfy its claims against the Potter-Lovell Company. of the various parties whose notes were thus fraudulently pledged stood on the same footing, except that the notes were pledged at different times, and fell due and were collected at different times; and except that one of the parties, the North Star Boot and Shoe Company, demanded the return of its note from the Potter-Lovell Company before the same was pledged, and has never paid the same in whole or in part to the bank.

These differences do not vary the equitable rights and liabilities of the parties as amongst themselves. The liability to contribute does not depend on a contract between the parties who are held liable to contribute, and is not affected by the fact that notes were pledged and fell due and were paid at different times, or that some of them were paid only in part, or not at all. The notes were all pledged to secure the same indebtedness. The fact that some of them fell due at earlier dates than others creates no equity in favor of those which fell due last. See American Loan & Trust Co. v. Northwestern Guaranty Loan Co., 166 Mass. 337. The various parties selected a common agent, and

this agent used its power to place them all under a common liability. thus virtually making them all sureties for itself. It might be that under such circumstances the pledgee would prefer to hold one and exonerate another, and it would have power to do so in the first instance by proceeding to collect of one, but not of another. But where several different parties have thus been exposed to loss by the fraud of their common agent, it is more equitable that the burden of the loss should be shared pro rata. Under such circumstances equality is equity, without respect to the time of the maturity of the notes. The demand by the North Star Boot and Shoe Company for the return of its note was also immaterial. It was no more fraudulent to pledge this note after such demand than it would have been to pledge it before a demand. All the notes being pledged as security for the same indebtedness, the whole loss in consequence thereof is to be borne by all the makers in proportion to the amounts of the notes so pledged. Gould v. Central Trust Co., 6 Abb. N. C. 381; New England Trust Co. v. New York Belting & Packing Co., 166 Mass. 42, and cases there cited; Wiggin v. Suffolk Ins. Co., 18 Pick. 145, 153; Warner v. Morrison, 3 Allen, 566; 1 Story, Eq. Jur. § 493.

The assignees in insolvency of the Potter-Lovell Company have no interest in the case. They have no claim arising upon any of these notes, and no duty in respect to the settlement of the questions involved in this suit.

Decree for the plaintiffs.

IN RE DENTON'S ESTATE.

COURT OF APPEAL, 1904.

[1904. 2 Ch. 178.1]

Vaughan Williams, L. J. This is a claim made by the Licenses Insurance and Guarantee Fund Corporation, as assignees of a mortgage deed, against the estate of Denton, deceased, a party to the mortgage deed, on a covenant therein contained; and the only defence raised is that the corporation and Denton are co-sureties for Miss Harvey, the mortgagor, and that Denton is therefore entitled to deduct from the claim of the plaintiff corporation the contribution due as between two co-sureties. The corporation contend that they are not co-sureties with Denton, but are sureties both for the principal debtor, the mortgagor, and for Denton, the surety under the terms of the mortgage deed; and that, this being so, there is no contribution according to the authority of the decision of Lord Eldon in Craythorne v. Swinburne, 14 Ves. 160; 9 R. R. 264.

¹ Only one opinion is printed. — ED.

The question whether the plaintiffs and defendant stand or do not stand in the relation of co-sureties within the meaning of this decision is the only question in the case. Swinfen Eady, J., has decided that the relation is that of co-sureties, and that Denton has a right of contribution. He bases this conclusion, as I understand, on the ground that according to the terms of the policy of insurance, which embodies the guarantee of the plaintiff corporation, both the corporation and Denton are liable for the same debt upon the same default of the mortgagor. I think that the plaintiffs and defendant are liable for the same debt upon the same default of the mortgagor for the reasons given by Swinfen Eady, J., in his judgment; but there is this difference, that whereas the liability of Denton to pay arises directly on demand left at the mortgaged premises, the liability of the corporation is only to pay after the expiration of six calendar months from the mortgagees, the bank, becoming entitled to exercise the power of sale conferred by the mortgage deed and giving notice thereof to the corporation; so that, even assuming the occasion of the liability arising to be the same because the power of sale is conferred upon leaving a demand for payment at the mortgaged premises without any further demand or notice (thus departing from the provisions of the Conveyancing Act, 1881), vet the time when payment will accrue due differs by six months, and I do not think that this difference can be left out of consideration when determining whether the corporation and Denton are co-sureties.

Perhaps it would be convenient now to consider briefly what are the material facts in this case, and what is the nature of the claim. [His Lordship then read the mortgage deed, and continued:]

A mortgage insurance policy was executed by the corporation on March 7, 1900, and it is alleged by the plaintiff corporation that this policy was effected in pursuance of a proposal for insurance dated October 28, 1899, which was put in evidence. There is some little difficulty about this, as the proposal and the policy do not quite accord, the proposal relating to a debt repayable by annual instalments, which is not the case with the mortgage debt. But I think that the proposal is sufficient evidence that the insurance was effected by the corporation on the basis that the mortgage debt which the corporation were insuring would be secured by a mortgage deed in which Denton would join for the purpose of guaranteeing the repayment of £1,000 of the principal money. The policy, however, makes no mention of Denton being a party to the mortgage deed. On the contrary, it describes the mortgage deed as made between Maude Harvey of the one part, and the "insured" (that is, the bank) of the other part. It refers, however, to a proposal in writing of October 28. 1899, for guaranteeing the said mortgage debt and interest, and recites that it is agreed that the said proposal shall be the basis of the contract of insurance intended. The premium of £18 15s. is recited as the first premium for guaranteeing the said mortgage debt and interest, and the policy goes on to witness as follows: [His Lordship then read the witnessing part, and continued:]

I think the proper inference of fact to draw from the proposal of October 28, 1899, and the mortgage deed of November 2, 1899, and the policy of March 7, 1900, is that, to the knowledge alike of the mortgager and the mortgagees, Denton and the corporation, at the date both of the mortgage deed and of the policy, it was intended that Denton should join in the mortgage as surety, and that the mortgage debt and interest should be guaranteed or insured by the corporation: the words "guarantee" and "insure" are used as synonymous in the policy.

I mention this inference because I think that the fact that there was one transaction only, to the details of which all were privy, may not be immaterial when one is considering whether the corporation ought to be regarded as co-sureties with Denton for the mortgagor, or as sureties for both the mortgagor and Denton under a distinct collateral security.

I will now consider what is the plaintiffs' claim on this summons. [His Lordship then read the summons, and proceeded:]

The facts as to the £984 13s. 6d. there claimed are these. The bank having left a demand at the mortgaged premises, gave notice to the corporation, under condition 5 of the policy, of their intention to exercise the power of sale, and proceeded, not strictly in accordance with the conditions of the policy, to sell the property. This sale realized the £4,000 and discharged the whole of the principal money owing on the mortgage. The source of the money thus discharging the principal, although it may have passed through the hands of the insurance corporation, was the proceeds of sale. The plaintiff corporation meanwhile expended the greater part of the £984 13s. 6d. sought to be recovered on this summons on matters such as repairs, etc., clearly necessary and proper for the maintenance of the mortgage security. The utterly unbusinesslike manner in which the business of the corporation was done makes it difficult to ascertain the true facts.

It might be suggested that this was a voluntary expenditure by the corporation, who had a clear interest, as Denton also had, that the mortgage security should not be wasted. But I think, on the evidence, that this expenditure may fairly be taken to be expenditure by the corporation at the request of the bank, and thus expenditure by the hank as mortgagees. If the expenditure cannot be so regarded, there is an end of the claim; but if it can be so regarded, the only question is, as I have already stated, Are Denton and the corporation co-sureties so as to entitle Denton to contribution?

In the first place, I will deal with a contention raised by the corporation and based on the decision of the Court of Appeal in Dane v. Mortgage Insurance Corporation, [1894] 1 Q. B. 54. This contention is that,

apart from anything else which might negative co-suretyship between the corporation and Denton, the very form of the obligation which they had undertaken towards the bank was sufficient to show that the corporation had entered, not into a contract of suretyship, but into a contract of No doubt the form is that of a policy of insurance; but I think there is nothing in the form of the contract between the bank and the corporation being that of a policy of insurance to prevent the contract being one of guarantee. I would refer to the judgment of Romer, L. J., in Seaton v. Heath, [1899] 1 Q. B. 782, 792, which on this point is unaffected by the reversal in the House of Lords of the judgment of the Court of Appeal. Romer, L. J., in discussing the difference in substance between these two classes of contract, says: "The difference between these two classes of contract does not depend upon any essential difference between the word 'insurance' and the word 'guarantee.' There is no magic in the use of those words. The words, to a great extent, have the same meaning and effect; and many contracts, like the one in the case now before us, may with equal propriety be called contracts of insurance or contracts of guarantee."

The distinction in substance, in cases in which the loss insured against is simply the event of the non-payment of a debt, seems to be, as I read the judgment of Romer, L. J., between contracts in which the person desiring to be insured has means of knowledge as to the risk and the insurer has not the same means, and those cases in which the insurer has the same means. Now it seems to me that in the case of this mortgage debt the insurance corporation, knowing the terms of the mortgage debt and the exact nature of the property forming the security, had just as much means of ascertaining the nature of the risk as the bank had; and I do not think that the mere fact that the contract was made between the creditor and the insurance corporation, and not between the mortgagor-debtor, Miss Harvey, and the corporation, would of itself determine the character of the contract to be that of insurance and not of suretyship. This being so, the form and circumstances of the contract being consistent with the relation of co-suretyship between the plaintiff corporation and Denton, let us see if the facts, dates, and the contents of the mortgage deed are such as to negative this contract which, according to its terms, is a contract of suretyship guaranteeing payment by the mortgagor — being a contract of suretyship constituting co-suretyship in relation to the contract of suretyship taken by Denton on himself by the mortgage deed.

If the policy is looked at, it will be seen that, in form at all events, both the corporation and Denton guarantee the payment of the mortgage debt by the mortgagor, Miss Harvey. The event upon which the obligation to pay arises is the same in each case; and although the corporation have six months within which to pay, yet the obligation neither of the corporation nor of Denton is dependent on what the mortgage security realizes. Taking these matters into consideration, there seems much to support the conclusion in fact of Swinfen Eady, J., that the

insurance corporation were sureties for and guaranteed the debt of Miss Harvey, and were not sureties only in the event that neither Miss Harvey nor Denton paid. If this conclusion, which seems to me to be a conclusion in fact, is right, it puts the case outside the case of Cravthorne v. Swinburne, 14 Ves. 160; 9 R. R. 264. I think it is a question of fact. It seems plain from the judgment of Lord Eldon in that case that, in considering the question whether the contract of insurance, the second contract in point of date, is to be considered as a collateral or supplemental security, the court may take into consideration, not only the words of the respective contracts, but also extrinsic evidence. Giving consideration to this evidence as well as to the words of the respective contracts, still, sitting by myself, I should have hesitated to differ from the conclusion of the learned judge, especially as I do not think that the mere fact that the corporation knew, at the time at which the policy was effected, from the mortgage deed or the proposal, that Denton was a surety, was sufficient to negative the relation of cosuretyship; and it is certainly a case in which I should have wished to apply the maxim that equality is equity if the facts allowed it; but as my brethren take a contrary view of the facts, I do not think that in such a doubtful case, turning largely on inferences of fact, I ought to refuse to concur in the judgment of the court.

BREWER v. STAPLES.

CHANCERY, NEW YORK, 1846.

[3 Sandf. Ch. 579.]

The bill was filed January 20, 1845, against William J. Staples, The Trust Fire Insurance Company, and others, to foreclose a mortgage executed by Staples to James H. Titus, on four lots of ground at Stapleton on Staten Island. The mortgage was dated September 15, 1846, was for \$1,500, and was accompanied by Staples's bond of the same date and tenor. Titus assigned the bond and mortgage to the complainant, prior to April, 1840, and she claimed \$1,200, of the principal to be due.

At the date of this mortgage, Staples executed a bond and mortgage to one Thurston, on five lots adjacent to the former; and Thurston assigned his bond and mortgage to Peter Embury. On the third day of April, 1840, for the further security of the debts to the complainant and Embury respectively, Staples assigned to E. Seeley, Esq., in trust for them, and as collateral to those debts, a bond and mortgage which he held, executed by one Quin. In 1841, Seeley foreclosed the Quin mortgage in chancery, and in behalf of the parties interested in it, bid off the mortgaged premises at the master's sale, for \$780. But the sale was never consummated, nor any deed given.

Staples being largely indebted to The Trust Fire Insurance Company, negotiated a settlement and compromise of the debt, offering lands in

payment. Before effecting an arrangement, he proposed to add to his offer the nine lots mortgaged to Titus and Thurston, subject to those mortgages. The compromise was finally made on that footing, and on the 29th day of May, 1843, Staples conveyed to the company, together with other lands, the nine lots before mentioned, subject to the respective mortgages thereon, viz., that to Titus on four, and the mortgage to Thurston on the remaining five; upon which the company discharged their demands against Staples. The lands conveyed by him, after deducting incumbrances, were not worth as much as his debt to the company. And at the time the testimony was taken in this suit, the deficiency exceeded the amount of Quin's mortgage.

The Trust Fire Insurance Company put in an answer to the bill, setting up most of these facts, and insisting that the complainant was bound to exhaust the security afforded to her by the Quin mortgage, before selling the four lots mortgaged by Staples to Titus. The bill was taken as confessed against all the other defendants. The cause was heard on the pleadings and proofs, as to The Trust Fire Insurance Company.

THE ASSISTANT VICE-CHANCELLOR. The validity of the claim made by The Trust Fire Insurance Company to have the complainant give to them the benefit of the Quin mortgage, depends upon their right as between themselves and Staples, to compel the application of the Quin mortgage towards the discharge of the complainant's debt. This point necessarily arises between the complainant and the Trust Fire Company, although in the present state of the pleadings, it cannot be decided as between the latter and Staples.

On the 29th of May, 1843, when Staples conveyed the Staten Island lots to the Trust Fire Company, he was the owner of the lots, subject to the mortgage to the complainant on which \$1,200 was due, and to another mortgage executed to one Thurston for \$1,500. Both of these mortgages were given in 1836, and were accompanied by the bonds of Staples.

At the same date, Staples was the owner of the Quin mortgage, or rather of the surplus therein, he having assigned it in 1840 to Mr. Seeley, as security for the payment of the two bonds to the complainant and to Thurston, and to be re-assigned to Staples on payment of those bonds.

Thus the complainant and Thurston were mortgage creditors of these lots and of Staples, and they by their trustee, Mr. Seeley, held the Quin mortgage as a security for the same debts. Staples was their primary debtor, the lots were their first security, and the Quin mortgage was their second, or collateral security.

At the same date first mentioned, Staples was the debtor of the Trust Fire Company, in a sum which he alleged he was unable to pay, and he had proposed a compromise of the debt; and after some negotiation, a compromise had been agreed upon, by the terms of which these lots were to be conveyed to the Trust Fire Company, subject to

the mortgages held by the complainant and Thurston. The proposal originally made by Staples did not include these lots, and there is no proof that the Quin mortgage was referred to, or entered into the terms of the compromise or the consideration of the parties.

The compromise was carried into full effect, and Staples complied with its stipulations. His conveyance of these lots vested them in fee in the Trust Fire Company, and it conveys them subject in express terms, to the two mortgages to the complainant and Thurston. All the testimony concurs in establishing that this language of the deed was intended, and was in accordance with the agreement of the parties.

Staples did not transfer, or, so far as it appears, intend to transfer, to the Trust Fire Company, any interest whatever in the Quin mortgage. If they have acquired any right or equity in that mortgage, it must be by operation of law.

Upon the conveyance of the lots to them, they ceased to be creditors of Staples. They became purchasers of the lots, the consideration of their purchase was a portion of the debt against Staples which they discharged, and they took the lots subject to the two mortgages held by Thurston and the complainant.

The clear effect of all this was, that the lots in question became the principal debtor to the complainant and Thurston; and as between Staples and the lots, or their new owners, the Trust Fire Company, Staples became a surety for the latter, in respect of the two mortgage debts. The Trust Fire Company did not become personally liable to pay those debts, but the lots in their hands became the primary fund for such payment, and to the extent of those lots the company were the principal debtors upon the two mortgages, and Staples was their surety in respect of his liability on the two bonds. It is impossible to distinguish this case in principle, from Jumel v. Jumel, (7 Paige, 591,) and Cox v. Wheeler, (7 ibid. 248). The same doctrine was asserted by Chancellor Kent, in Tice v. Annin, (2 J. C. R. 128,) and it has been enforced in many other reported cases since that time.

The authorities relied upon by the Trust Fire Company are applicable to creditors, who having a lien upon one fund only, are entitled in equity to marshal the securities of a creditor having a prior lien upon the same fund, and having also an effective lien upon another fund or estate. And the error of the defendants has arisen from their continuing to regard Staples as their debtor, in respect of that portion of their debt which they forgave to him without any, or if any, for a nominal payment; instead of realizing that they had discharged him, and become the purchasers of his lots charged with the burthen of these mortgages.

The Trust Fire Company have no right to compel the application of the Quin mortgage to the complainant's debt. On the contrary, Staples has an equity to compel the lots to be sold for the payment of that debt, so that the Quin mortgage may be restored to him.

I entertain no doubt whatever upon the question, and must make the usual decree for the complainant.

C. Division of the Equity of Redemption.

WIKOFF v. DAVIS, HART AND OTHERS.

CHANCERY, NEW JERSEY, 1842.

[3 Green's Ch. 224.]

The Chancellor. William Davis and Catharine his wife, on the seventh of August, in the year eighteen hundred and fifteen, made and executed a mortgage to William Wikoff and Elias Conover, to secure the payment of a bond for four thousand six hundred and sixty-six dollars and sixty-six cents, in two equal payments, at a short date after its execution. Elias Conover, one of the mortgagees, died first; afterwards William Wikoff, the remaining mortgagee, died intestate, and the complainant has filed his bill as the administrator of William Wikoff, the surviving mortgagee, to foreclose the mortgage, and for a sale of the lands therein mentioned. William Davis, the mortgagor, also died intestate, and his administrators, under an order of the orphans' court, sold the mortgaged premises at public sale, on the sixth of September, eighteen hundred and twenty-eight, to Dr. John T. Woodhull, of the county of Monmouth.

Dr. Woodhull became the purchaser, subject to the encumbrance created by the complainant's mortgage, and with the understanding that he should pay it off. After his purchase, he sold the property in parcels to the following persons, and at the following times, and received from all the purchasers the full consideration for the parts so sold to them, they trusting that he would pay off and remove the existing encumbrance without subjecting them to any difficulty.

He sold on the twentieth of October, eighteen hundred and thirty-one, to Walter W. Hart, forty-eight acres and fifty hundreths; on the twenty-sixth of September, eighteen hundred and thirty-two, to Samuel Perrine, the main portion of the farm, with certain reservations to the grantor; on the fifth of October, eighteen hundred and thirty-two, to William D. Davis and Richard Davis, a part of the land so reserved, consisting of twenty-seven acres and thirty-eight hundredths of cleared land; and on the thirteenth of May, eighteen hundred and thirty-five, to six different persons, in distinct lots, the balance of the mortgaged premised so reserved as aforesaid, consisting of woodland: these lots are now owned by William Hartshorne and Stephen Patterson.

The complainant's mortgage is not disputed, except as to the amount due upon it, nor is it denied that it constitutes a lien, and may resort to all the property covered by it for payment. The only question is, as to the order in which the property must be sold. Walter W. Hart, the first purchaser, insists upon the rule, that the portion first sold shall be the last resorted to for payment of the mortgage. Perrine and Davis insist upon the same rule, but frankly admit that their respective deeds, though dated at different times, were executed and delivered at the same time, and should be bound to bear a ratable propor-

tion towards discharging the mortgage, after exhausting the wood lot held by Hartshorne and Patterson. Hartshorne and Patterson insist, under the circumstances of this case, that all the property should contribute towards paying off the mortgage, according to the value of the several shares; while the complainant stands indifferent as to the order of sale, being entitled to his money from all the lands embraced in the mortgage.

Every question raised in this case will be found settled in this court, as I think, in the case of Shannon v. Marselis and others, Saxton, 413. By that case it is declared, that if a mortgagor sell the land covered by the mortgage, in different parcels, and at different times, that portion of the land last sold must first be applied in discharge of the mortgage. If the land last sold will not pay off the encumbrance, then that portion sold next preceding it must be disposed of, and so on, reversing the order in which the mortgagor conveyed the property. This is the undeniable rule on all sales made directly by the mortgagor. But this case, if I understand it aright, goes farther, and decides more. One of the parcels sold by the mortgagor had been again sold by the purchaser in parcels to different persons, and at different times; and it was held that among these there were equities, and that that portion should be sold first which was the last conveyed.

The distinction set up in the present case is, that the sale of the land into parcels was not made by Davis, the mortgagor, but by Woodhull, who became the purchaser of the whole farm, at the administrator's sale. This difference is supposed to consist in this, that in the one case the mortgagor is personally liable for the debt to the mortgagee, and not in the other. Chancellor Williamson, in the case of the Executors of Clymer v. James and others, does indeed express a doubt as to carrying the principle farther than to sales made by the mortgagor, but it is a mere suggestion at the close of a long opinion on other matters, without any case cited to support it, and he does not profess to have made up any opinion on that point himself, but reserves it for consideration, whenever the case comes up for final decree. That case was referred to James S. Green, Esquire, as master, who reported that the land ought to be sold on the principles established in the case from Saxton, 413, before referred to, and the Chancellor (Seeley) decreed in conformity with the master's report. What Chancellor Williamson would have done, had the case been finally decided by him, it is impossible to say, but the decree as made did not carry out his suggestion, and was acquiesced in, as I learn, without an appeal being taken. In New York, the subject has been repeatedly considered by different chancellors, and without any such distinction being acknowledged: 1 John. Ch. 447; 5 John. Ch. 241; 2 Paige, 300. In the last case, Chancellor Walworth uses this comprehensive language: "Where lands, belonging to several persons, are covered by a mortgage given by the person from whom they all derive their titles, the lands last sold by him are first liable to satisfy the encumbrance, and the several parcels must be sold by the master in the inverse order of their alienation." No difference is here taken, whether the owners derive title directly from the mortgagor or not, nor have I been furnished with any decision that does. All these cases must, of course, refer only to such purchasers as buy on the same terms; for if it appear that one bought with the promise to pay off the whole encumbrance, and another without any such understanding, a court of equity would enforce so plain an agreement. I confess I do not perceive the force of the reason upon which the distinction is taken, between a sale made directly by the mortgagor, or by a purchaser from the mortgagor. It is not only because the mortgagor is personally liable for the money, that the rule is adopted, but because the property is bound as security for the debt, and in case a part is sold, the residue remaining in the hands of the mortgagor should first be applied. Had Dr. Woodhull never sold any part of this farm, except the forty-eight acres to Hart, should not the residue still belonging to him have been first applied to pay off the mortgage? He had purchased. subject to the mortgage, and promised to pay it off, and then sold to Hart and received his full consideration. If this be so, then upon what principle can the rights of Hart be affected by any future disposition of the property made by Dr. Woodhull? Neither case can be viewed in the light of a rent charge, growing out of the land itself. The debt in either case is a personal obligation on the part of the debtor, and the charge on the land is only as a security for the debt. But if the proposition be true, that the personal liability of the mortgagor to pay the debt makes a difference, the objection should not prevail in this case. for Dr. Woodhull was actually bound to pay this debt: he purchased the farm subject to it, and promised to discharge the encumbrance.

I am therefore of opinion, that the rule, as settled in this court, must obtain in the present case, and that the portion of the farm now owned by Hartshorne and Patterson must first be sold, the part conveyed to Perrine and the Davises under their answers must next be sold, and the portion conveyed to Hart must be sold last.

There is one other question made in this case, touching certain payments alleged to have been made on the mortgage, by Dr. Woodhull; this would more properly have come up on the master's report, and in fact the whole case would have been better presented at the coming in of his report. I think Dr. Woodhull a competent witness in respect to his payments, for as to some of the defendants, by whom he is offered, he has been fully released, and he is so involved in the whole proceeding as to be balanced in his interest. If the payment be applied to this mortgage, he is liable for so much more on his own obligation in the hands of the complainant, and whether applied to the one or the other, it can make no difference to him. The six hundred dollars is fully shown by him to have been paid on this mortgage, and must, I think, be a credit to that amount. As to the other credits claimed, I do not think, from his evidence, they ever were so applied. I leave the question open, as I should, to the master, to take the account in his

discretion, directing him to use the deposition of Dr. Woodhull as a competent witness in the cause.

When the master makes his report, if any of the parties see ground for excepting to it, they will be at liberty to do so; and if upon drawing up the final decree there shall be any embarrassment in its detail to meet the views here expressed, it will be then settled.

Reference to a master.1

BURGER v. GREIF.

COURT OF APPEALS, MARYLAND, 1880.

[55 Md. 518.]

FRASON, J. (after stating the facts). The rule is too well settled to need the citation of authorities in its support, that where one person has a lien upon two funds, or two pieces of property, and another holds a lien upon but one of those funds or pieces of property, that the first lienor will be compelled, in equity, to seek satisfaction of his claim from that fund or piece of property which is not covered by the lien of the second lienor, before resorting to the fund or property which is covered by the second lien. This rule has been adopted and enforced so as, if possible, to enable all the lienors to receive payment of their claims, it being deemed inequitable that the first lienor should exhaust the fund or property to which alone the second lienor could look for payment, while he had another fund or property from which his claim could be, in whole or in part, satisfied.

There is another rule, which, we think, after a careful examination of the authorities, may be considered as settled—and that is, that where a party gives a mortgage upon his property, and afterwards conveys his equity of redemption to different parties at different times, the property so conveyed is liable for the mortgage debt in the inverse order of its alienation; or, in other words, that the property last conveyed must be exhausted in payment of the mortgage debt, before the mortgagee can resort to that which was conveyed before it in point of time. While the decisions in some few of the States hold that the mortgaged property is equally bound in the hands of all parties to whom it may have been conveyed. The great weight of authority is in support of the rule we have stated. The decree of the court below is based upon the latter rule, and the question is, whether the facts in the case now before us bring it within that rule.

¹ Accord: Orvis v. Powell, 98 U. S. 176; Dalus v. Streety, 59 Ala. 183; Hunt v. Mausfield, 31 Conn. 488; Brown v. McKay, 151 Ill. 315; Dyson v. Simmons, 48 Md. 207; Chase v. Woodbury, 6 Cush. 143; Johnson v. Williams, 4 Minn. 260; Crafts v. Aspinwall, 2 N. Y. 289; McClaskey v. O'Brien, 16 W. Va. 791.—Ed.

It will be borne in mind that, after the deed of assignment of both the lots by Faulstich to Gebhard, that the latter mortgaged lot No. 1 to Max and Levi Greif on the 24th April, 1878, subject to the Henderson mortgage in common with lot No. 2. This mortgage was to secure the payment of the sum of fifteen hundred dollars. Gebhard then assigned all his interest in both lots to Bernard Funke after proceedings had been commenced by Max and Levi Greif to foreclose The appellee, Max Greif, became the purchaser of their mortgage. lot No. 1 at the trustee's sale, which was made subject to the operation of the mortgage to Cornelia L. Henderson. The price he paid for it was eleven hundred and fifty dollars, when the proof shows that the lot was worth from three thousand to three thousand five hundred dollars. It is evident, therefore, that he was enabled to purchase at the price named solely because this lot, in common with the rest of the land, was subject to the lien of the Henderson mortgage, which fact was announced and made known to the persons who attended the sale. Where a party purchases at a judicial sale, subject to a prior mortgage, it is to be presumed that he bids no more than the value of the equity of redemption. The appellee, having purchased at the trustee's sale, subject to the operation of the Henderson mortgage, would be bound equally with the other purchasers to pay his portion of the mortgage debt in proportion to the value of his lot, had it not been for the fact that the deed of assignment, executed by Gebhard to Funke, in express terms, charged the payment of the Henderson mortgage on the two lots so assigned to Funke, the consideration for the assignment being the sum of sixty dollars and "the payment of the mortgage hereinafter referred to," it being the Henderson mortgage. One of the exceptions to the rule we have referred to is, that where the mortgagor sells part of the mortgaged land, and by the deed charges the payment of the mortgage debt on the land so conveyed, the land so charged must be exhausted in satisfaction of the debt before any other parts of the mortgaged lands can be resorted to for payment, whether they remain in the hands of the mortgagor, himself, or have been conveyed to other parties. Welch v. Beers, 8 Allen, 152; Caruthers v. Hall, 10 Mich. 40. After the deed of assignment to Funke, the appellee purchased lot No. 1 at trustee's sale, subject to the Henderson mortgage, and took his title subject to the charge, in common with lot No. 2 in Funke's hands, to pay the Henderson mortgage -each lot being liable for its proportion of the debt in proportion to its value at the time of its sale. But there is still another exception to the rule that property sold by a mortgagor must be resorted to for payment of the mortgage debt in the inverse order of its alienation, and that is where full value has not been paid for the land, but it has been sold subject to the mortgage; and the purchaser's liability to pay his proportion of the debt forms part of the consideration of his purchase. This principle is sustained by the cases

referred to on this point in the appellants' brief, to one of which only do we deem it necessary to refer, as announcing the only just and equitable rule in such cases. In Carpenter v. Koons, 20 Pa. State Reps. 226, 227, Black, C. J., in delivering the opinion of the Supreme Court, says: "A man who purchases part of a tract covered by a mortgage buying the title out and out, clear of encumbrances, and paying a full price for it, has a clear right to insist that his vendor shall allow the remainder of the mortgaged premises to be taken in satisfaction of the mortgage debt before the part sold is resorted to. This being the right of the vendee against the mortgagor himself, the latter cannot put the former in a worse condition by selling the remainder of the land to another person. The second purchaser sits in the seat of his grantor, and must pay the whole value of what he bought towards the extinguishment of the mortgage before he can call on the first purchaser to pay anything. The first sale having thrown the whole burden on the part reserved, it cannot be thrown back again by the second sale. In other words, the second purchaser takes the land he buys subject to all the liabilities under which the grantor held it. But if the rule is to cease when the reason of it ceases, it cannot extend to a case where the first sale was made subject to a mortgage, and that is the condition of the present one." Where all the purchasers from a mortgagor have bought subject to a mortgage, the obligation of each to pay the mortgage forming part of the consideration of his purchase, they all stand upon equal footing. and the mortgagee has the right to sell any part he may think proper for the payment of his debt, and the only remedy the party whose land is sold has, is a proceeding to compel contribution from the other purchasers.

There was error, therefore, in the decree of the Circuit Court in restraining the sale of lot No. 1 by Cook, the trustee, and in directing a sale as prescribed by said decree.

It is alleged in the bill, and has been contended in argument, that there was a combination and confederation by and between Cook, trustee, and the other defendants, to fraudulently release Burger's property from the operation of the mortgage, and to have the appellee's lot sold first therefor. We think the proof is not sufficient to sustain the charge; but even if it was, and it clearly appeared that Cook, trustee, and Dolfield, were endeavoring to sell the appellee's lot first, they were doing, as we have shown, what they had a right to do; nor can we see in what respect the appellee could have been injured thereby.

It was further contended that the appellee had the right to pay the debt, interest and costs, and thereupon to have the mortgage and decree assigned to him. We do not agree to this view. The appellee could have paid the amount due with the costs of the case, and such payment would have entitled him to have contribution from the other parties who had bought parts of the mortgaged premises.

For the reasons above assigned the decree appealed from will be reversed and the cause remanded for further proceedings, in accordance with the views expressed in this opinion.

Decree reversed, and cause remanded.

BRADLEY v. GEORGE.

SUPREME COURT, MASSACHUSETTS, 1861.

[2 Allen, 392.]

HOAR, J. This is a bill in equity to redeem land from a mortgage. By the agreed statement of facts, it appears that one Daniels, who was the owner of fifteen acres of land in Milford, mortgaged the same to Godfrey and Mayhew; and afterwards conveyed about six acres by a deed of warranty to the plaintiff. Subsequently to both these converances Daniels became insolvent, and his right in equity to redeem the remaining nine acres was conveyed by his assignees in insolvency to Nathaniel Chessman, who mortgaged the same to the defendant. The defendant then procured an assignment to himself of the original mortgage to Godfrey and Mayhew, and entered to foreclose it for breach of the condition. The plaintiff asks in his bill that the defendant may release to him the parcel of about six acres which he holds under the deed of warranty from Daniels, without contribution by him toward the first mortgage; and it is admitted that the value of the nine acres is fully sufficient to satisfy the first mortgage without such contribution.

The court are of opinion that this case must be governed by the decision in Chase v. Woodbury, 6 Cush. 143. The only difference between the two cases is, that the defendant has only a mortgage title to the part of the land which remained the property of Daniels after the deed of warranty to the plaintiff; while in Chase v. Woodbury the tenant held the whole remaining title. But we do not think that this fact makes any difference in the rights of the respective parties. The deed of warranty exempted the land conveyed to the complainant from any contribution toward the mortgage, if Daniels had afterwards paid it; and the defendant, claiming under Daniels, by subsequent conveyances, could acquire no greater right than his grantor had. The effect of the warranty was to discharge the plaintiff's part of the land from the mortgage, and to make the part retained by Daniels exclusively liable for it, as against Daniels and all persons claiming under him. The defendant, as assignee of the original mortgage, has un-

doubtedly the right to enforce it against the whole mortgaged premises, if the whole were needed for his security. But as he would be under obligation to refund the whole amount which the plaintiff might in that case be compelled to pay, before he could avail himself of his title to the nine acres under the second mortgage; and as the nine acres is fully sufficient to satisfy the first mortgage, the plaintiff is entitled to the decree prayed for by the bill.

Decree accordingly.

ELLIS v. FAIRBANKS.

SUPREME COURT, FLORIDA, 1896.

[38 Fla. 257.]

LIDDON, J., after stating the facts:

Two questions of law are presented by the record: First, whether a release from the lien of a mortgage by a mortgagee to a mortgagor of a part of the land mortgaged prevents the mortgagee from foreclosing the mortgage against the mortgaged land not released, where such land not released had previous to the release been sold and conveved by the mortgagor to a third party, and of which sale and conveyance the mortgagee at the time of such release had notice and actual knowledge; second, whether a failure to pursue the remedy at law upon the promissory note of solvent makers, which are secured by a mortgage upon real estate, until such notes are barred by the statute of limitations and the makers become insolvent, prevents the enforcement of the mortgaged lien upon the mortgaged premises as against purchasers of the same. The first proposition must be answered in the affirmative. It is a familiar doctrine, and sustained by many authorities, that where lands are mortgaged to secure a debt, and a part of said lands are subsequently sold and conveyed by the mortgagor, the portion unsold is primarily liable under the mortgage. A release subsequently given by the mortgagee, without the assent of the purchaser of the part sold, to the mortgagor of the portion unsold, will not prejudice the rights of such purchaser if the mortgagee gave such release with notice or knowledge of the rights and equities of the purchaser. If the part released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the part which has been sold (Gaskill v. Sine, 13 N. J. Eq. 400, s. c. 78 Am. Dec. 105, and authorities cited therein), but such release operates as a discharge of the lien to the extent of the value of the land released. Hoy v. Bramhall, 19 N. J. Eq. 563, s. c. 97 Am. Dec. 687; Cogswell v. Stout, 32 N. J. Eq. 240, and authorities cited; Mobile Marine Dock

& Mutual Ins. Co. v. Huder, 35 Ala. 713. The rule being well settled by adjudication, it is unnecessary to discuss the reasons underlying the same. It may be said, however, that this right of a purchaser to claim a non-liability in full or pro tendo on account of the release of a fund primarily liable to a mortgage, is an equitable and not a legal right, and is governed by those equitable principles upon which a court of chancery protects the rights of sureties, or those who stand in the situation of sureties. Guion v. Knapp, 6 Paige, 35, s. c. 29 Am. Dec. 741; Birnie v. Main, 29 Ark. 591; Parkman v. Welch, 19 Pick. 231; Sheldon on Subrogation, sec. 74, and authorities cited.

It will be noted that we have above stated that a release by a mortgagee to a mortgagor of land primarily liable to the lien of a mortgage has the effect to discharge wholly or pro tanto the land which has been sold by the mortgagor, when such release was made without the assent of the purchaser. In this case the pleadings are far from being as clear and definite as they should be upon this subject, and have occasioned us some difficulty. The bill contains no express allegation that the release by the mortgagee was with the assent of the purchaser. The only averment upon that subject is, that Edwin W. L'Engle, through whom the testator of the appellant derived title, "advised with and encouraged the said Thomas B. Ellis to obtain said partial release." This averment is not expressly denied by the answer. We cannot, however, regard it as a sufficient allegation of assent or agreement upon the part of Edwin W. L'Engle to the release made by complainant to the mortgagor, Thomas B. Ellis, and we therefore have no foundation in the record upon which to adjudicate the effect upon the rights and equities of appellant's testator, of such an assent given by his grantor of the premises. We have considered the case as presenting no question of such assent or waiver of his rights by said purchaser from the mortgagor.

Our attention has been called to the case of Jordan v. Savre. 24 Fla. 1, 3 South. Rep. 329. In the sixth head-note of this case the following proposition is stated: "A release or estoppel as to a part of the mortgage indebtedness, and as to the lien of the mortgage on a part of the land mortgaged, does not affect the residue of the debt nor the lien of the mortgage as to the remainder of the land." The proposition of law stated in the quoted head-note is not in conflict with any conclusion reached in the case now before us. In the cited case the release complained of was not made by the mortgagee to the mortgagor to the prejudice of the rights and equities of a purchaser of the mortgaged property, but was made of a portion of the land to the purchaser himself who had purchased the entire mortgaged premises. The release was made to the very party complaining of it, with his assent and at his instance and request. The quoted head-note is entirely correct, upon the facts in the case in which it was made. The propositions of law established by it are entirely inapplicable to the facts of the present case.

The second proposition stated must be settled in the negative. It is settled beyond any doubt or cavil in this State that the fact that the remedy at law is barred by the statute of limitations upon promissory notes secured by a mortgage under seal does not affect the lien of the mortgage, and that such lien is only affected by the longer term which by the statute is applied to sealed instruments. Jordan v. Sayre, 24 Fla. 1, 3 South. Rep. 329; Browne v. Browne, 17 Fla. 607. It is contended, however, that such a rule might be applicable to the mortgagor or his legal representatives, but that it has no application to purchasers of the premises from the mortgagor. The contention cannot be maintained. The rule was applied as against a purchaser in Jordan v. Sayre, supra. It has also been held as against purchasers of the mortgaged property in other States. Inge v. Boardman, 2 Ala. 331; Fievel v. Zuber, 67 Texas, 275, 3 S. W. Rep. 273; Norton v. Palmer, 142 Mass. 433, 8 N. E. Rep. 346.

In disposing of this case we have considered simply the exceptions as made to the answer, and whether the same were well taken.

The decree appealed from is reversed, with directions that such further proceedings be had in the case as may be in accordance with equity and this opinion.

D. Order of Satisfaction.

MASON v. PAYNE.

CHANCERY, MICHIGAN, 1844.

[Walker Ch. 459.]

Motion to dissolve injunction on bill and answer.

Jacob Beeson, being the owner of five several lots of land,—say Nos. 1, 2, 3, 4, and 5,—in June, 1834, mortgaged them to George Kimmel for \$1,000, payable in five years, with interest; which mortgage was duly recorded. In May, 1836, Beeson sold lots Nos. 1, 2, and 4 to the complainant, Jasper Mason, subject to "the payment of the whole and entire amount" of the Kimmel mortgage; and the latter covenanted to pay the mortgage, and to indemnify and save harmless Beeson, his heirs, executors, administrators, and assigns, from any claim or demand on account of it. In August, 1836, Mason sold and conveyed, by warranty deed, lots one and four to Stanton and Hamilton, who purchased without notice, as the answer states, that the con-

veyance from Beeson to Mason, their grantor, was subject to the Kimmel mortgage. In October, 1840, Payne purchased these lots, viz., one and four, in trust for the bank, as the bill states, and the trust is not denied by the answer. In December, 1837, Mason, being the owner of lot fifty-eight in the village of Niles, mortgaged it to Stanton and Hamilton, and one Walker, who was at that time part owner with them of lots one and four, to indemnify them against the Kimmel mortgage. This mortgage was recorded about the time it was executed. Mason afterwards, in March, 1838, sold lot fifty-eight to Thomas Fitzgerald, subject to the payment of the Kimmel mortgage, which was thereby "charged upon the said lot of land." In August, 1841, Fitzgerald sold it to the bank, subject to the mortgage from Mason to Stanton, Hamilton, and Walker, and a mortgage executed by Fitzgerald to Cogswell K. Green, which mortgages were to be "and remain as a lien on said premises, according to the true intent thereof, until fully paid and satisfied by the said party of the second part, their successors in office or assigns." On June 27, 1840, Kimmel obtained a decree to sell the lots mortgaged to him, unless they were redeemed within a given time, in payment of his mortgage, which decree was assigned by him on December 6, 1843, to John F. Porter, and afterwards by Porter to the bank. The complainant, who was still the owner of lot No. 2, insisted the bank, as the purchaser of lot fifty-eight from Fitzgerald, was bound to pay the Kimmel mortgage, and that, therefore, the assignment of the decree by Porter to the bank, was, in equity, a satisfaction of the decree; and prayed the bank might be decreed to acknowledge satisfaction of the decree.

The Chancellor. The effect of the conveyance from Beeson to Mason, of lots one, two, and four, subject to the payment of the whole of the Kimmel mortgage, as between them, was to make these lots the primary fund for the payment of that mortgage; Cox v. Wheeler, 7 Paige, R. 248; Jumel v. Jumel, Id. 591; and the covenant of indemnity was to secure Beeson against any deficiency of the fund.

Where a part of mortgaged premises has been aliened by the mortgagor, subsequent to the mortgage, the rule in equity, on a foreclosure and sale, is to require that part of the premises in which the mortgagor has not parted with his equity of redemption, to be first sold; and then, if necessary, that which has been aliened; and, where the latter is in possession of different vendees, in the inverse order of alienation. This rule, however, is inapplicable to the conveyance from Beeson to Mason, as it was made subject to the payment of the Kinmel mortgage, which raised an equity in favor of Beeson to have the lots conveyed by him to Mason first applied in payment of that mortgage, if Mason failed to pay it in pursuance of his covenant. The answer denies Stanton and Hamilton had notice of this equity, when they purchased of Mason. If they had not actual notice they were chargeable with constructive notice. They could not make out their title to lots one and four, without claiming through Beeson's deed to Mason, their

grantor; and they were, therefore, chargeable with notice of the contents of that conveyance. Jumel v. Jumel, 7 Paige R. 591; Harris v. Fly, Id. 421; Moore v. Bennett, 2 Ch. Cas. 246. This conveyance, as I have already stated, as between Beeson and Mason, in equity, charged lots one, two, and four, with the payment of the whole of the Kimmel mortgage; so that neither Mason nor his privies in estate, who are chargeable with notice of its contents, have a right, as against Beeson, to have the Kimmel mortgage paid by a sale of that part of the mortgaged premises not conveyed by Beeson to Mason.

But, as the conveyance from Mason to Stanton and Hamilton was not made subject to the Kimmel mortgage, they would have a right, as against Mason, if they were still the owners of lots one and four, to have lot No. 2, still owned by Mason, first sold to satisfy the decree; and the bank has the same right, unless that right has been displaced by a new equity, between the bank and Mason, growing out of the purchases of lot fifty-eight and the decree by the bank.

Lot fifty-eight is no part of the premises mortgaged by Beeson to Kimmel, but was mortgaged by Mason to Stanton, Hamilton, and Walker, when they were owners of lots one and four, to indemnify them against the Kimmel mortgage. Mason, to whom it belonged to pay that mortgage, afterwards sold lot fifty-eight to Fitzgerald, "subject to the payment of the whole of Kimmel's mortgage," describing the mortgage particularly in the conveyance. This, as between Fitzgerald and Mason, made lot fifty-eight a fund for the payment of Kimmel's mortgage. It was no longer a mere security of indemnity to Stanton, Hamilton, and Walker, and their grantees, but was charged with the payment of that mortgage. Now, as between a mortgagor and his vendee, subject to the mortgage, the mortgaged premises are a primary fund for the payment of the mortgage debt; so, in the present case, as between Mason and Fitzgerald, or his vendee the bank, lot fifty-eight is the primary fund for the payment of the Kimmel mortgage. The bank purchased, subject to the Stanton, Hamilton, and Walker mortgage, and another mortgage to Green; and, under the rule above stated, the bank was chargeable with notice of the contents of Mason's deed to Fitzgerald, when it purchased of him. And, as the bank owns both lot fifty-eight and the decree, the latter must be considered as satisfied, if the property is worth, and will sell for enough to pay what is due on the decree; otherwise, it is a satisfaction only so far as it will go towards paying the decree.

The complainant's case was not one proper for an injunction, but for an order staying proceedings in the foreclosure suit, which might have been obtained on application by petition to the court. In the language of Chancellor Walworth, "an application, by a party or privy to a proceeding in this court, to stay such proceeding, must be directly to the court itself, for an order to that effect;" and an officer out of court has "no authority to allow an injunction for that purpose." Ellsworth v. Cook, 8 Paige R. 643; 2 Paige R. 26. This objection was not taken

on the argument; and, an answer having been put in; and the case being one in which an order would have been granted, I shall let the injunction stand in the place of an order.

Motion denied.

WORTH v. HILL.

SUPREME COURT, WISCONSIN, 1861.

[14 Wis. 559.]

By the court, Paine, J. This was an action to foreclose a mortgage, and the appeal presents a contest merely between two subsequent encumbrancers of different tracts covered by this mortgage, as to which was entitled, in equity, to have the tract of the other sold first. Perhaps the following general statement of the situation of the parties will be sufficient to a proper understanding of the question decided.

The mortgage being foreclosed covered two different tracts in different towns. The defendant Buck, who is the appellant, held a mortgage next to this in point of time, covering one of the tracts contained in this mortgage, and other land not covered by this, in the same town. The defendant Mowry held a mortgage next to Buck's in point of time, but upon the land in the other town covered by this mortgage, and also upon another tract. Thus it will be seen that the mortgage of Mowry was not upon any part of the land mortgaged to Buck, but their interests conflict by reason of the mortgage which is being foreclosed, which is prior to both and covers a part of the land encumbered by each of these defendants. It further appeared that there was a mortgage prior to all these, covering the tract in the Buck mortgage and the one in the Mowry mortgage, which are not contained in the mortgage now being foreclosed, and that such prior mortgage had been foreclosed, and that part which was covered by Mowry's mortgage adjudged to be sold before the part covered by Buck's. It was further proved that the other tract covered by Buck's mortgage was ample security for the amount of the debt secured by that mortgage. It was even shown to be of greater value than the entire amount of the Buck mortgage and the first mortgage before referred to, prior to all, for the satisfaction of which the other tract covered by Mowry's mortgage had been adjudged to be first sold. Upon this state of facts, the court below decreed that the portion covered by Buck's mortgage should be sold in this foreclosure before that covered by Mowry's, and from that part of the decree Buck brought this appeal.

His counsel relies upon the established equitable rule, that in foreclosure cases, where the land has been subsequently conveyed by the mortgagor, it shall be sold in the inverse order of alienation. The justice of this rule has been some times questioned, but we regard it as not only well settled, but correct upon principle, and have repeatedly enforced it. But at the same time we think it may be controlled by other established equitable principles, where the facts render them applicable, and such, we think, was the case here. It is a familiar principle, that where one creditor has security upon two funds, and another has security upon one of them only, the latter may compel the former to resort first to that fund which he cannot reach. And although this is not a direct proceeding to accomplish that object, yet it is substantially that, inasmuch as Mowry sets up these facts to rebut the equity, Buck would otherwise have as against him. For the result, if the judgment had been otherwise, would have deprived Mowry of his security entirely. The one tract covered by his mortgage having already been adjudged to be sold first, for Buck's benefit, now if the other should be adjudged to be sold first, he would have nothing left. Whereas it appears by the testimony, that upon the decree as rendered, Mowry is protected, and Buck left with ample security for his debt.

Suppose A. mortgages a tract to B., then gives a second mortgage on a part of it to C., which mortgage also covers other tracts, and then gives a mortgage on another part to D.? On a foreclosure of B.'s mortgage, the ordinary rule, based merely on the order of alienation, would be to sell D.'s part first. But suppose D. could show that the other tracts covered by C.'s mortgage were an ample security for his debt, would not that raise an equity sufficient to overcome the ordinary rule, and require, as between C. and D., that C.'s part should be first sold? I think so; and that is substantially the relation which these defendants hold to each other in the present case. I can see no reason why the principle requiring the creditor having two funds to resort first to the one which the other creditor cannot reach is not applicable to such a case. It is true that ordinarily the adequacy of the first fund might be tested by an actual sale, and the creditor who was compelled first to resort to that might still be in a position to resort to the other, to supply any deficiency; and here Buck may not be left in such a position. I think that is good reason why such a decree as the one made in this case should be made only upon clear proof of the entire inadequacy of the remaining security. But I am not prepared to say that courts should not act upon such proof, or that a party so situated has any absolute right to have the adequacy of his remaining security tested in all cases by an actual sale. It is obvious that such a test could not be had in a case like this, and consequently, if that rule were adopted, it would lead to the injustice of cutting off the last mortgagee entirely, though it might not be at all necessary for the protection of the second. Courts are constantly adjudicating upon the most important rights of parties upon the theory that human testimony can establish facts with sufficient certainty to justify such adjudication, and I think the question of the adequacy or inadequacy of a security should form no exception.

I think the judgment should be affirmed, with costs, against the appellant, in favor of the plaintiffs and of Mowry.

Judgment affirmed accordingly.

HOPPES v. HOPPES.

SUPREME COURT, INDIANA, 1889.

[123 Ind. 397.]

Olds, J. (after discussing other points): -

It is next objected that the complaint does not show that the appellees had any defence to the original action. This objection, we think, is not tenable.

As appears from the allegations of the complaint, Daniel Hoppes was the principal debtor, and his wife, Mariah, was his surety, they both mortgaged real estate for the payment of the debt, and it is a well-settled principle that when the principal and surety both mortgage property for the payment of a debt of the principal, the surety is entitled to have the property of the principal first sold to satisfy the debt (Brandt Sure. and Guar., section 204), and a purchaser of the property of the surety so mortgaged would have this same right; so, one taking title to such property of the surety by inheritance would have this right. It has been repeatedly held by this court that a wife joining in a mortgage with her husband to secure his debt has the right to have his two-thirds interest in the land first sold to pay the debt. Birke v. Abbott, 103 Ind. 1; Figart v. Halderman, 75 Ind. 564; Medsker v. Parker, 70 Ind. 509; Leary v. Shaffer, 79 Ind. 567; Grave v. Bunch, 83 Ind. 4; Main v. Ginthert, 92 Ind. 180; Trentman v. Eldridge, 98 Ind. 525.

The children of Mariah Hoppes, deceased, had the right, under the facts alleged in the complaint, to have the husband's lands, first sold to satisfy the mortgage debt.

The next alleged error is the overruling of the motion for a new trial.

The object of an action to review a judgment is to set aside the original judgment and procure a new trial. When the review is based on the ground of new matter discovered after the rendition of the

original judgment, it does not differ materially from, and its effect is the same as the setting aside of a judgment on a motion for a new trial. In either case the result is the setting aside of the judgment and allowing a new trial of the cause, and it was held in the case of Hornady v. Shields, 119 Ind. 201, that the same rule would apply in reviewing the action of the lower court when the judgment of review had been rendered and a new trial granted, as in case of the granting of a new trial on motion, and this we think the correct rule.

The judgment rendered in this case was that the original judgment be set aside, and that the appellees be allowed to defend.

In this we think no injustice was done, and that the finding and judgment were warranted by the evidence.

It appears from the evidence that at least some portion of the debt secured by the mortgage was the individual debt of Daniel Hoppes; indeed, there is evidence from which the court may have found that the whole debt was the individual debt of Daniel. It is expressly declared in the mortgage to be the debt of Daniel, and it is apparent from the evidence and the record in the case that Daniel and Isaac did not pursue the ordinary course to settle the estate of the deceased wife of Daniel. Daniel had a right to sell and convey to his father the title to but an undivided one-third of the forty acres of land owned by his late wife, and both he and his father must have known this fact, at least they were presumed to know it, and that Isaac knew when he received the conveyance, and agreed to pay the mortgage, that he only got title to the undivided one-third.

The evidence as it appears in the record bears upon its face some traces of a scheme between Daniel and Isaac, whereby they intended to make the wife's forty acres pay the mortgage, which upon its face showed it was given to secure the debt of Daniel, and deprive the children of Daniel and his deceased wife of any interest in her land, and secure to Daniel all the surplus in value of the eighty acres mortgaged over and above an amount sufficient to satisfy the mortgage. The court trying the cause could best judge of the evidence.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

MANDEL v. McCLAVE.

SUPREME COURT, OHIO, 1889.

[46 Oh. St. 407.]

Bradbury, J. The husband of plaintiff in error is still living, and, therefore, when his lands were sold by the sheriff and the proceeds thereof distributed by the order of the court of common pleas, she had only a contingent right of dower therein. This right, the court found, was sold and passed to the purchaser at the sheriff's sale. To this finding she took no exception, being apparently satisfied to have her rights determined by the order of distribution.

The proceeds of the sale were \$17,600, of which \$13,663.37 were consumed in paying the taxes, costs and mortgage liens, about which no contention arose; there then remained a balance of \$3,930.63 to be distributed to the wife and the two judgment creditors. Of this sum she claimed \$500.00, in lien of a homestead; on this claim the court found in her favor, and the amount was paid to her. The defendant, McClave, excepted to this finding and order of the court, but did not, so far as the record discloses, bring the question to the attention of the Circuit Court, nor has he presented the matter to this court for review. He will, therefore, be regarded as acquiescing in the action of the court below respecting it, and the question will not be further noticed here.

The only ruling of the courts below that we are asked to review is that which limited the right of the wife to dower in the proceeds of the equity of redemption. As the fund is large enough to pay in full Lowe's claim, notwithstanding the wife's claim may be allowed to its full extent, it follows that he is not interested in the question; but as the claim of the wife, to the extent it may be allowed, will be paid out of funds that would otherwise be distributed to McClave, the contention is confined to them.

McClave concedes that the wife is entitled to be endowed of the proceeds of the equity of redemption, while she claims the right to be endowed of the entire proceeds of the land, to be paid, however, out of the proceeds of the equity of redemption. He contends that her release of dower to the mortgagees enures to his benefit; that it was an absolute release of that right in the premises to the extent of the mortgage debt, and that in satisfying the mortgage debts out of the proceeds, her interest in so much of the fund as was required for that purpose should be applied equally with that of her husband.

Her contention, upon the other hand, is that her contingent interest in the whole premises was pledged, together with the whole interest of the husband therein for the payment of his debt; that the debt being his, it was primarily chargeable upon his interest, and

that his entire interest in the thing pledged should be applied to pay the debt before resorting to her interest therein.

This precise question is new in this State, and we are to solve it by applying to the facts such settled legal and equitable principles as in their nature are applicable and pertinent thereto.

If the contingent right of a wife to dower in her husband's real estate is recognized by the laws of the State as property, and if her release of it by joining with her husband in a mortgage to secure his debt is not a technical bar, but, instead, only enures to the benefit of the mortgagee and his privies, we perceive no principle of law or public policy that should prevent a court of equity from applying, in favor of the wife, the equitable rule, that the property of the debtor shall be first applied to the satisfaction of his debt before resorting to that of the surety. And the creditors of the husband have no standing in a court of equity, to prevent the application of this equitable rule; they have no claim that property, which, as between husband and wife, belongs to the wife, shall be taken, without her consent, and applied to pay their debts against the husband. first question, therefore, to be determined, is whether, in this State, the contingent right of a wife to dower in her husband's real estate is property, having a substantial and ascertainable value.

To reconcile all the cases, even in Ohio, on the subject of the nature of the wife's contingent right of dower, or respecting the effect of her release of it by joining with her husband in a conveyance of the real estate to which it attaches, would be impossible. In the cases upon the subject in this, or in other States, or in England, almost every shade of opinion can be found. Nowhere is this wide divergence of judicial opinion more clearly set forth than in the dissenting opinion of Judge Johnson, in Black v. Kuhlman, 30 Ohio St. 196, where that able judge reviews the cases in support of the older and more technical rules on the subject. The court, however, took the more liberal, and, as we think, the more reasonable view of the question. And there seems to be clearly discernible in the Ohio cases a growing tendency to disregard the older and more technical rules of the earlier cases; and this is especially true of the later cases in this State.

It is an incontestable fact that, in the estimation of the business world, the contingent right of the wife, during the husband's life, to dower in his real estate, at his death, has a positive and substantial value, and no acuteness of artificial reasoning, founded on technical rules of law, can persuade a prospective purchaser to the contrary.

This practical view of the matter has been adopted by the later Ohio cases. Ketchum v. Shaw, 28 Ohio St. 503; Black v. Kuhlman, 30 Ohio St. 196; Unger v. Leiter, 32 Ohio St. 210; Kling v. Ballentine, 40 Ohio St. 391.

In Black v. Kuhlman, supra, the court held, not only that her con-

tingent right of dower was valuable, but that, during her husband's life, its value could be ascertained with reasonable certainty under tables of mortality, "based on wide and long observations." And furthermore, that its value should be thus ascertained, as against mortgagees in whose mortgages she had not joined, and paid to a subsequent mortgagee to whom, by joining with her husband, she had subsequently released it.

In Unger v. Leiter, supra, the court found the contingent right of the wife to dower to be valuable, and that value capable of ascertainment "by reference to tables of recognized authority on that subject, in connection with the state of health and constitutional vigor of the wife and her husband." In addition to these cases we have statutory recognition of the property of the wife in her contingent right of dower in the real estate of her husband during his life. Ohio Laws, vol. 82, page 14. This statute directs the probate court to ascertain the value of the wife's contingent dower in the real estate of an insolvent debtor, and directs the same to be paid to her. Thus we have the legislature as well as the courts of the State, recognizing this right as tangible property, capable of being ascertained, and in a proper case given to her or to her releasee.

What, then, is the effect of her release of this right by joining with her husband in a mortgage to secure his debt? Does it enure to the benefit of other persons who are strangers to the deed, or is its operation restricted to the grantee and his privies? This latter view we think the more reasonable; it accords more nearly with the probable intention of the parties to the instrument; there is no ground to assert that the mortgagee was contracting for the benefit of any one but himself; there is nothing in the nature of the transaction from which it can be inferred that a wife, by joining with her husband in a mortgage of his lands to secure his debt, intends more than to pledge her contingent right of dower for that particular debt; nor is there, in the terms of the instrument itself, any language importing such intent. If, therefore, the instrument has any such effect, it is the result of some technical rule of law giving to the deed of the parties in this respect an operation never, so far as can be gathered from the words of the parties, within their contemplation. Whatever the state of the law may be elsewhere, we think no such technical rule now prevails in Ohio; some of the earlier cases seem to give it support, but the tendency of the later cases is to limit the operation of the release to the mortgagee and his privies.

In Ketchum v. Shaw, 28 Ohio St. 503, a case involving the right of a wife to dower, we find this language used by Judge Wright (506): "She joined in the conveyance of the land, releasing her dower, not absolutely, but only so far forth as it was necessary to pay the mortgage debt. That done, everything else remains to her."

In Kitzmiller v. Van Renselaer, 10 Ohio St. 63, it appeared that,

after the recovery of a judgment against the husband, he sold his real estate to a third person, the wife joining in the deed by a release of dower. Afterwards the land was sold under an execution issued on the judgment, whereupon the purchaser ejected the grantee under the deed of the husband and wife. The husband then died, and the wife brought suit for dower against the purchaser at the judicial sale. He sought to defeat her claim for dower by setting up her release to the grantee of the husband; but the court held that the release did not enure to his benefit. On page 64, this language is found: "He cannot make the release available to him as a grant, for he was not a party to the grant; nor is he in privity with the grantees. release cannot operate in behalf of the defendant below, by way of estoppel; for, "a stranger cannot be bound by, nor take advantage of, an estoppel." Here the wife had released her right of dower to the grantee of her husband, absolutely; no right of redemption reserved as in a mortgage, yet the court hold that the release is wholly inoperative, except in favor of the grantee. Cases can be found in Ohio that conflict with this view; but this irreconcilable conflict leaves us to adopt that view which accords most nearly with that presumed intention of the parties, which arises from the nature of the transaction, and a rational construction of the language they have used.

It being established that the contingent right of the wife to dower in her husband's real estate is property, the value of which can be ascertained by the aid of fixed principles, and that her release of it by joining with her husband in a mortgage, to secure his debt, does not, by reason of any technical rule of law, enure to the benefit of a stranger to the instrument, either by way of grant or estoppel, it remains for the court to determine to what extent equity will protect this right, after the real estate has been converted into money and the fund is before the court for distribution. The undoubted rule is, that, so long as the real estate remains in the husband or his grantee, equity will not interfere in her favor during the life of the husband, but that she must await her husband's death, when her inchoate right will become consummate. When, however, the estate has been sold at a judicial sale, free from her contingent right of dower, whatever right she may have is in the proceeds of the sale, and must be enforced, if at all, by a distribution of the fund.

If the plaintiff in error had been seised of a separate estate, and it had been pledged, together with the husband's property, for the payment of his debt, there can be no doubt that his property would be primarily liable for its payment. As between each other he would be the principal and she his surety. We think the same principle should be applied to her contingent right of dower. It is property; its value can be ascertained. More than this, it is a favorite of the law. (See authorities collected in American & English Encyclopedia of Law, vol. v. page 885, note.) It is a provision for her support, and when she pledges it for her husband's debt, by joining in a

mortgage with him, the most obvious principles of natural justice require that this benevolent provision of the law should not be touched until the husband's interest has been first exhausted. She is a purchaser. The inception of her right was earlier than that of the creditors; it began with the marriage and seisin of the husband; theirs began when the debt was contracted, but only became a lien from the recovery of the judgment against the husband. This favorite of the law is entitled to protection equal to that accorded to her other property.

We are aware that this question has been decided differently in many of the States, but by courts holding views of the nature of contingent dower, and of the effect of the wife's release thereof, widely different from those adopted in this State in relation thereto, and the decisions are, therefore, of little or no weight here. One Ohio case, Bank v. Hinton, et al., 12 Ohio St. 509, is not in harmony with our view, but the able judge who wrote the opinion in that case rested the decision respecting this point upon the authority of two New York cases: Hawley v. Bradford, 9 Paige, 200, and Bell v. New York, 10 Paige, 49, and entered upon no discussion of the principles necessarily involved therein.

The conclusions reached by the court in these two cases in Paige were legitimately drawn from the doctrine which obtains in New York respecting the nature of the contingent right of the wife to dower, and the effect of a release of it by her, by joining with her husband in deed or mortgage; but they by no means follow from the rules laid down in Ohio cases on the same subject, and therefore those cases cannot be regarded as of sufficient authority to prevent our deducing from the Ohio cases such results as legitimately follow from them.

Whether Bank v. Hinton, supra, resting as it does upon those cases in Paige, has become a rule of property in this State, which we would deem ourselves bound to follow in cases coming within its exact terms, we need not stop now to inquire.

The more recent case of Kling v. Ballentine, supra, is in accord with our decision here. In that case the contest was between the widow and certain devisees, who were daughters of the husband. The widow had, during her husband's life, joined with him in a mortgage of his land to secure his debt, and the court held that, as against the husband's devisees, who were his daughters, the widow was entitled to dower in the whole of the lands, to be paid out of the surplus after the mortgage debt had been paid, thus exhausting the husband's interest before resorting to the wife's dower. In that case the devisees were entitled to all the interest of the husband, their devisor, as in the case at bar the judgment creditors were entitled to all the interest of their debtor in the fund; and the principles that underlie and justify the holding of the court in that case are the same which we apply to the case before us; they are, that the

contingent interest of the wife to dower in her husband's real estate is valuable, and that her release of it by joining with him in a mortgage to secure his debt, is not a technical bar, and enures only to the mortgagee and those claiming under him.

It follows, therefore, that the judgment of the Circuit Court and that of the Court of Common Pleas should be modified so as to give the plaintiff in error the value of her contingent right of dower in the entire fund.

THE EDWARD OLIVER.

ADMIRALTY, 1867.

[L. R. 1 Adm. 379.]

This was a motion on behalf of the master of the "Edward Oliver," for payment of his wages and disbursements out of the proceeds of the ship and freight, under the following circumstances:—

Four causes had been instituted against the "Edward Oliver": One by the master, John Lucas Follett, for wages and disbursements; two by bottomry bondholders, the bonds in each case being upon ship, freight, and cargo, and stating the master to be personally liable; and the fourth for towage. The owners of the ship had not appeared; the owners of the cargo had appeared and given bail for the payment of the bottomry bonds. Freight had been paid into court and the vessel. had been sold. The court, reserving all question of priorities, had pronounced in favor of the master's claim; and with respect to the bonds had pronounced in favor of their validity, and had condemned the proceeds of the vessel and freight in the amount and in costs, and had condemned the owners of the cargo and their bail in the balance, if any, due on the bonds, after the proceeds of ship and freight had been exhausted, and in costs. The amounts of the claims were as follow:—

Cause 3689, master's clai	im				£1281	9	4
Cause 3709, bottomry .					1162	6	2
Cause 3744, bottomry .							
Cause 3972, towage							

exclusive of costs in each cause.

To meet these charges there were the following funds:-

Vessel, gross proceeds .						£2310	0	0
Freight paid into court						350	0	0
						2660		
Deduct marshal's fees .								
Balance in registry	٠		•	•		£2452	6	8

June 4. Lushington, in support of the motion. The question is this, whether the master's claim for wages and disbursements is to be postponed because he signed the bond.

June 20. Dr. Lushington [after stating the facts as above]. It appears that the amount of proceeds of ship and freight is insufficient not only to pay both the master's claim and the bonds, but even the bonds alone. The bondholders, however, are secure, because they have the bail of the owners of cargo to fall back upon, but the master's lien for wages and disbursements extends only to ship and freight. The motion to the court is to pronounce the master entitled to priority of payment out of the proceeds of ship and freight now in the registry. If this motion is refused the ship and freight will be exhausted in payment of the bonds (and indeed will have to be supplemented by the cargo), and the master, who has no claim against the cargo, will lose his remedy in rem altogether. If, on the other hand, it is granted, the result will be that the master will first be paid out of ship and freight; then the remainder of the proceeds of ship and freight will be exhausted in part payment of the bonds, and the balance will be paid by the owners of cargo. This balance, as compared with the balance in the other alternative, will of course be greater by the exact sum paid out of the proceeds of ship and freight to the master. In either case the bonds would be paid in full. The contention is solely between the master and owners of cargo.

The owners of the cargo contend that the rule of the court — established in the case of "The Jonathan Goodhue," Swa. 524 — that the holder of a bottomry bond, upon which the master has made himself personally liable, is paid out of the proceeds of ship and freight before the master, is an absolute rule. In support of this contention, reference was made to the case of "The Priscilla," Lush. 1.

In that case there were two bonds, one upon ship and freight only, and the other, of posterior date, on ship, freight, and cargo; and the rule that a posterior bond takes precedence over an earlier bond was enforced, although the enforcement of the rule was not necessary for the protection of the posterior bond, and resulted in the earlier bond being left unpaid. For the effect of precedence being given to the posterior bond, coupled with the rule that ship and freight must be exhausted before cargo is resorted to in payment of bottomry bonds, was that the whole of the proceeds of ship and freight were exhausted in payment of the posterior bond, and nothing was left to satisfy the earlier bond. Whereas, if the earlier bond had been paid out of proceeds of ship and freight, the remainder, supplemented by the cargo, would have been enough to discharge the second bond in full. The point, however, as to whether the rule gave an absolute priority does not seem to have been raised in argument.

Mr. Clarkson further directed the attention of the court to a well-known rule of equity, that no marshalling is permitted to the prejudice of third parties. In the present instance it was alleged that marshall-

ing of assets between the master who has ship and freight as his only securities and the bondholders who have ship, freight, and cargo, would work to the injury of the owners of cargo, who would thus become charged with a larger sum than they would otherwise be liable to; and further, that this additional charge would be improperly saddled upon the cargo, because, though nominally due under a bond affecting cargo, it would really represent a burden to which cargo is not liable, viz., wages and disbursements of master.

On the other hand, it is argued for the master, that the master's lien on ship and freight for wages and disbursements in general takes precedence of a bottomry bond, and though this lien is liable to be postponed to a bottomry bond, for which the master has made himself personally liable, there is no absolute rule to this effect; that it is a rule made only for the protection of the bondholder, and consequently does not obtain where the bottomry bondholder does not need such protection. That in this instance the bottomry bonds will certainly be paid in full out of cargo, if not out of ship and freight; that the holders, therefore, have no interest in claiming to be paid out of ship and freight before the master, and that the owners of cargo have no equity to insist upon the holders of the bonds pressing their claim.

This is the first time the point has been raised. The general principle is clear. If a master, by the terms of the bottomry bond, has bound himself as well as ship and freight for the payment of the bond, it would be manifestly wrong that in defeasance of his own contract he should not only not pay the bond himself, but obtain out of the proceeds of ship and freight payment of his own claims against the owners. leaving the bottomry bondholder unpaid. Hence the rule by which the master's claim is liable, under those circumstances, to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case; that is, ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him. I see no reason why the owners of cargo should be benefited at the expense of the master; for the master, though he may have bound himself for the payment of the bond to the holder thereof, has made no such contract with the owners of cargo, and they are not entitled to invoke a rule made only for the protection of the bondholder.

The court will therefore pronounce the proceeds of the ship and freight to be first applied in payment of the master's claim for wages and disbursements.¹

¹ Compare: Re Bank of Nova Scotia, 4 Fed. 667. - ED.

BUTLER v. STAINBACK.

SUPREME COURT, NORTH CAROLINA, 1882.

[87 N. C. 216.]

RUFFIN, J. The record in this case discloses but a single issue, raised by demurrer of the plaintiffs to the answer of the defendants, A. L. Stainback and wife.

The facts of the case are as follows: On the 9th day of March, 1881, the defendants, T. M. White and A. L. Stainback, as partners and as individuals, and their wives, executed a mortgage to the defendants, Rountree & Co., to secure to them a debt of about \$8,000, wherein were conveyed a storehouse and lot then occupied by the firm, the residence of White and the residence of Stainback.

The residence of White, so conveyed, and the one undivided half of the storehouse and lot are the property of Mrs. White; and the residence of Stainback is his individual property, and the other half of the storehouse and lot is the firm property.

On the 6th day of February, 1882, the said firm of White & Stainback executed to the defendant, P. N. Stainback, a deed, wherein, after reciting the fact that they had previously given the mortgage, including the separate property of Mrs. White, and that they were desirous of paying the debt thereby secured, in order to relieve her estate, they conveyed all their firm assets, consisting of goods and evidences of debt, in trust to sell and collect, and with the proceeds to pay, as constituting the first class, certain enumerated debts, ten in number, and aggregating some \$13,000, including the debt of Rountree & Co. for \$8,000, and a debt of \$1,112.24 due the plaintiffs.

The fund in the hands of the trustee is insufficient to pay the whole of the preferred debts, and the plaintiffs, while conceding for the present that so far as Mrs. White's separate property is embraced in the mortgage, she is a surety and entitled to be exonerated, insist that they have an equity to compel the defendants, Rountree & Co., to resort for the payment of their debt to the other half of the storehouse lot and the residence of Stainback, and to exhaust them before they can be allowed to participate in the funds in the hands of the trustee, and to enforce this equity is the purpose of their action.

On the other hand, the defendants, Stainback and wife, insist that, as to the plaintiffs and all the other creditors of the firm, they are entitled to a homestead in their residence embraced in the mortgage to Rountree & Co., and to have the funds in the trustee's hands applied ratably to all the preferred debts, including that to Rountree & Co., so, as far as possible, to relieve their homestead, and in their answer they ask that this may be done.

The plaintiffs demur to this answer upon the ground that the facts of the case do not in law establish a right in the defendant,

Stainback, to have a homestead superior to the equity claimed by the plaintiffs.

The judge presiding in the court below sustained the demurrer, holding that the defendants, Rountree & Co., could not participate in the trust fund, until they had exhausted the real estate of A. L. Stainback conveyed in the mortgage, and requiring them to look to that and the undivided half of the storehouse belonging to the firm, as their first source of payment.

To this administration of the rights and equities of the several parties, this court is unable to give its concurrence.

In the first place, the deed of the 6th of February, 1882, expressly provides that the debt due to Rountree & Co. shall share in the benefits of the trust with the other debts therein enumerated, as preferred. It matters not what motive prompted such a provision, the makers of the deed, who were the owners of the property conveyed, and therefore competent to dispose of it upon any terms not inconsistent with the policy of the law and the demands of good faith, have affixed to the trust this condition, that a ratable part of the fund raised thereunder should go to the debt to Rountree & Co., as a pro tanto exoneration of the lands hitherto conveyed to them by mortgage. The plaintiffs, while accepting the benefits of the trusts and seeking as they are to have distribution under it, cannot be permitted to object to the terms imposed. They are themselves enjoying a preference over the unsecured creditors of their common debtor, and it poorly becomes them to cavil at the terms upon which they are permitted to do so.

After a careful examination of all the authorities bearing upon the subject, we have found no case in which the equitable doctrine of marshalling securities has been applied, where one security was given and expressly declared to be in exoneration of another previously given, even though other interests might be involved in the later security, and it should prove to be insufficient fully to protect them all. Nor indeed can we conceive how it could do so, if in any degree respect is to be shown to the will of the creator of the two securities.

Again, while the doctrine of marshalling securities by which a creditor, having a lien on two funds, will be confined to that fund which is not common to both, is well established, and as was said by Chancellor Kent in Cheeseborough v. Millard, 1 John. Ch. 409, "is recognized in every cultivated system of jurisprudence," still, it is not founded on contract, but rests upon equitable principles only, and the benevolence of the court; and it is never extended so as either to affect injuriously the creditor who has double security, or trench upon the rights of the common debtor or of third persons. Ayres v. Husted, 15 Conn. 504; Leib v. Stribling, 51 Md. 288. And especially will a court of equity never displace one equity or right for the purpose of upholding or asserting another.

The defendant in this case, it is true, has encumbered his homestead with a mortgage; but, save as to the creditor therein secured, his right of

homestead remains, and if, by a proper application of the other property of the firm conveyed in the same mortgage, and of that part of the trust fund specially appropriated to the satisfaction of the mortgage debt, his homestead can be disencumbered, he has a clear right to have it done. Cheatham v. Jones, 68 N. C. 153. There can be no principle of equity which will deprive him of this right merely in order that a creditor, to whom no lien upon the homestead has been given, may reap a larger dividend from another fund.

To apply the principle of marshalling assets in such a case would be but an indirect way of subjecting a homestead to the payment of debts, when the very object of the law is to confer a homestead exemption superior to all creditors, and ever consecrated, except so far as it may be impaired by the voluntary act of the claimant himself.

In Maw v. Lewis, 31 Ark. 203; Dickson v. Chom, 6 Iowa, 19, and McArthur v. Martin, 23 Minn. 74, we have authorities directly in point. In each case a creditor had a mortgage on two tracts of land, and another creditor held a mortgage on one of the tracts, and the latter sought to compel the former to exhaust the tract not embraced in his mortgage first, it being however the one in which the mortgagor claimed a homestead; and it was held by reason of the mortgagor's equity (it being one which the courts favor) the securities should not be marshalled.

Though not directly in point, no decision can furnish a stronger analogy, or serve more certainly to show the disposition of the courts to favor such exemptions, than that rendered by this court in Curlee v. Thomas, 74 N. C. 51, in which a judgment was not allowed to be set off by another judgment upon the ground that it was needed to make up the party's personal property exemption; and this, notwithstanding the equitable jurisdiction to set off cross-judgments, has been immemorially exerted, and certainly is as firmly established on the basis of reason, and appeals as strongly to the sense of justice, as does the doctrine of marshalling assets, on which the plaintiffs in this action rely.

In the opinion of this court, therefore, it was error in the court below to sustain the demurrer, and the judgment thereof is reversed, and judgment will be entered here overruling the plaintiffs' demurrer, and the same will be certified to the end that the cause may be proceeded with in reference to the issues involved.

Error.

Judgment accordingly.1

1 Compare: Dolphin v. Aylward, L. R. 4 H. L. 486. - Ep.

